Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

CHRISTIAN A. BERTOLI,

Petitioner,

v.

KENNETH OBERFELDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where a law enforcement officer is found by a jury, on disputed facts, to have used deadly force in violation of the Fourth Amendment, is the officer barred, as a matter of law, from having the jury hear and determine a defense of qualified immunity.

Whether 42 U.S.C. §1988 permits the award of a multiplier fee enhancement to a fee applicant, who otherwise acknowledges that his lodestar fee calculation represented a "reasonable rate for reasonable hours expended," because he was incarcerated at the time of filing his lawsuit and was appointed counsel by the District Court.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christian A. Bertoli respectfully requests that a writ of certiorari be issued to review the Decision and Order of the United States Court of Appeals for the Ninth Circuit entered on June 4, 2003, on these issues of substantial importance.

OPINIONS BELOW

The unpublished memorandum decision of the United States Court of Appeals for the Ninth Circuit in the consolidated appeals of *Bertoli v. Oberfelder*, Nos. 01-07302 and 02-15423 (per curium) (rehearing denied), is reprinted in Appendix at page 1a. The unreported orders of the District Court in *Oberfelder v. Bertoli*, No. C-98 1470 MHP (M. Patel, J.), including the order denying summary judgment and order denying motion for new trial, are reprinted at pages 7a-31a and 52a-56a.

STATEMENT OF JURISDICTION

The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was entered June 4, 2003. On August 8, 2003, the Ninth Circuit denied a timely petition for rehearing and for rehearing *en banc*. (32a)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Original jurisdiction of the District Court was invoked by respondent under 28 U.S.C. §1343.

STATUTORY/CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . . "

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. Amend. IV.

STATEMENT OF THE CASE

1. In 1996, the Sonoma County Sheriff's Department conducted an investigation of Kenneth Oberfelder, aka Kenneth Brewer, a fugitive from Idaho since 1988 who was suspected of narcotics sales. (19a)[1] Sonoma County Sheriff's Deputy Bertoli ("petitioner"), an undercover

[1] Although most of this factual background is taken from the District Court's memorandum and order denying summary judgment, it was predicated upon the parties' Joint Statement of Undisputed Facts (See, 19a, n.2).

narcotics deputy, participated in the investigation and conducted surveillance of Oberfelder which led, ultimately, to a planned narcotics transaction between Oberfelder and a confidential informant for approximately 6.6 pounds of cocaine. (19a) The transaction and arrest was to take place on June 27, 1996. Oberfelder then left a meeting at a local Petaluma, California parking lot after which he was followed by officers involved in the investigation, including petitioner. *(Ibid.)* Oberfelder arrived at a residence at 1287 San Rafael Drive in Petaluma, backed his Volvo into the driveway (trunk facing the garage), remained in the car and left the engine running. Petitioner, who had followed, parked his unmarked vehicle on the street, exited his vehicle with gun drawn to his side, clothed in a black jersey shirt with "SHERIFF" in gold lettering on the back and the front. He wore jeans, a baseball cap and a sheriff's badge on the hat and on his belt. (20a) Petitioner ran in front of the Volvo, in the middle of the road, shouted "Sheriff's Department! Freeze!" at least twice and "Stop the car!" (*Id.*) Oberfelder contended that he did not hear these orders and feared he was being "ripped off." (21a) Petitioner saw Oberfelder's hand drop from view and he thought "weapon." Oberfelder put the Volvo into gear and accelerated out of the driveway, into the roadway where petitioner stood in full view. (*Id.*) Petitioner decided to shoot his weapon while standing in front of the accelerating vehicle and thought the vehicle was going to run over him. (61a) The vehicle accelerated toward petitioner ultimately at a speed of thirteen (13) miles per hour (19 feet per second). (74a) The car turned while petitioner was in the act of shooting and the bullet went through the driver's side rear window, passed through Oberfelder's seat and transversed his body. (21a) Oberfelder was thereafter pursued and arrested. The entire sequence of

events, from the initial stop by petitioner until the discharge of his weapon occurred in 4.5 seconds (68a). The time elapsed from the initial movement of the vehicle until the shot was 2.7 seconds. (70a)

2. Respondent Oberfelder brought this Fourth Amendment excessive force claim following his arrest by petitioner. Although the case was tried to a jury, the unique procedural history which preceded the trial bears upon this petition.

On November 22, 1999, petitioner filed a motion for summary judgment which, in part, urged that the doctrine of qualified immunity barred the suit against him. The motion was heard January 14, 2000. On February 10, 2000, the District Court denied the motion. Relying upon then-prevailing Ninth Circuit authority of *Katz v. United States* ("*Katz*"), 194 F.3d 962 (9th Cir. 1999) [*reversed by Saucier v. Katz*, 533 U.S. 194 (2001)], the District Court denied immunity, stating in part:

> The Ninth Circuit has repeatedly held that "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Katz v. United States*, 194 F.3d 962, 968 (9th Cir. 1999) (citing cases). In fact, this court believes that using immunity, an 'affirmative defense,' in an excessive force case is a mis-reading of Section 1983 law. In excessive force claims, immunity is the flip side of the reasonable force issue. . . . It is not clear to the court why defendants in these circumstances persist in offering an affirmative defense upon which they have the burden of proof. *Katz* finally dictates clearly that this is the correct analysis. (27a-28a)

After the District Court's order denying summary judgment, the case upon which the District Court relied, *Katz*, was granted review by the United States Supreme Court upon a writ of certiorari (*see Saucier v. Katz*, 531 U.S. 991 (2000) (Mem.)), where it was pending at the time of trial.

The qualified immunity issue was again raised by petitioner at pretrial conference by submitting a proposed jury instruction on the affirmative defense, which cited as its authority *Anderson v. Creighton*, 483 U.S. 635 (1987) and *Hunter v. Bryant*, 502 U.S. 224 (1991), and which would have asked the jury to determine if petitioner was "plainly incompetent or knowingly violated the law" as a factual issue. The proposed instruction read, in pertinent part:

> A law enforcement officer is entitled to the defense of qualified immunity from claims for money damages. The defense of qualified immunity is intended to protect a law enforcement officer from liability unless they are [sic] plainly incompetent or knowingly violate the law. A law enforcement officer is protected by qualified immunity if a reasonable officer could have believed his conduct was justified. In this case, you must decide whether a reasonable officer would have believed that their [sic] life was in danger at the time of the incident.

(Petitioner's Proposed Instruction, Ninth Circuit Appellant's Excerpts of Record ("ER"), p. 464)[2] The District

[2] As the instruction was proposed prior to the issuance of this Court's decision in *Saucier v. Katz, infra*, petitioner was constrained by

(Continued on following page)

Court refused this instruction, stating only: "[I]t won't be given." (Reporter's Transcript of Pretrial Hearing of 4/24/01, p. 41) Since the instruction was not allowed, Appellant was precluded from arguing the application of the affirmative defense to the jury and from asking the jury to make the factual determination necessary for the defense, including whether petitioner was plainly incompetent or knowingly violated the law.

At the close of evidence, Oberfelder moved for "directed verdict" on liability, which could only be granted if there were "no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed.R.Civ.Proc. Rule 50(a). The District Court denied the motion, because it found "there [was] evidence in dispute. A number of factors the [jury] can look at. . . . " (Trial Transcript p. 1307) By doing so, the District Court necessarily concluded that there was legally sufficient evidentiary basis for a reasonable jury to find in *either parties'* favor.

During the second day of deliberations, the jury inquired about the meaning of "intentional" in the Special Verdict. The jury asked: "Is the act of defending yourself by shooting the gun considered intentional?" (Trial Transcript p. 1427) The District Court responded:

> The question of whether Deputy Bertoli was acting in self-defense or acting out of some other purpose, that is for you to decide. That is solely really a question of fact. What is meant by the

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the prevailing Ninth Circuit authority at the time, which the *Saucier* decision, of course, greatly impacted after the trial.

> term "intentional" – and this gets to your second question, which is sort of a rephrasing of it: "is intentional *the decision to shoot the gun*?" Is that the acts or omissions that were done – or we say the acts that were done that plaintiff claims violated his constitutional rights, or the act of shooting, must be an act that was intentional. In other words, not a mistake or an accident. Does that help? (*Id.* at 1427)

Juror responded: "I think so." (*Id.*) The answer to the question was tied strictly to the shooting of the gun, and not to the perception leading up to it. The question that was never addressed was whether petitioner was "plainly incompetent or knowingly violated the law" or, rather, mistakenly believed he was entitled to use the level of force that he used, which *Saucier* requires. The jury verdict was returned on May 11, 2001, and found that petitioner used excessive force, but that his conduct was not intentional, malicious or oppressive such that punitive damages were warranted. (ER 522-524)

On June 18, 2001, the United States Supreme Court issued its decision in *Saucier v. Katz*, *supra*, 533 U.S. 194, reversing the Ninth Circuit decision and remanding the matter. By such, the Supreme Court held that the Ninth Circuit's analysis in *Katz*, the very same analysis adopted by the District Court in its February 10, 2000, Order, was erroneous. In *Saucier*, this Court held that the analysis for purposes of qualified immunity was separate and distinct from that of a determination of excessive force. As such, a law enforcement officer could be protected by a qualified immunity, notwithstanding a constitutional violation. (*Saucier*, at 205-206)

Through a motion for new trial after the jury verdict, petitioner argued that, based upon the *Saucier* decision, the question of qualified immunity should have been presented to the jury, and a new trial was warranted to determine whether petitioner was reasonably mistaken about his belief that his life was in danger when he made the decision to use deadly force, such that qualified immunity would attach. (Reporter's Transcript of Hearing on Motion for New Trial 8/30/01, pp.3-4) After having already found that questions of disputed facts regarding the use of force had precluded a ruling on Oberfelder's Rule 50(a) motion, the District Court incongruously substituted its judgment for that of the jury, ruling that "no reasonable jury could find that Bertoli was acting under a reasonable mistake," and accordingly, denied the motion for new trial. (ER 896) Petitioner's denial of a jury trial on this very fundamental defense, where the facts were disputed, amounts to a deprivation of his Seventh Amendment right to trial by jury.

3. After denial of petitioner's motion for new trial, Oberfelder submitted an application for attorney's fees associated with the case and the eight-day trial, which sought a lodestar recovery of $638,000, a sum Oberfelder's attorneys asserted was a "reasonable fee" for "reasonable hours expended." Added onto the attorney fee application was a request for a multiplier because of the "undesirability" of Oberfelder as an incarcerated plaintiff who had obtained the appointment of counsel on his behalf. There was no suggestion that an enhancement was necessary to achieve a reasonable fee. The application attached an unauthenticated letter from Oberfelder to the District Court which explained (as a request for appointment of counsel) that, due to Oberfelder's incarceration it was

"difficult" to contact potential attorneys; that he had a "criminal defense team" representing him at the time; that he had no funds in jail to "send copies of the complaint and case to [potential civil] attorneys"; that he "has been focusing on my criminal matters, they have had precedence" but thought "perhaps I'll be able to give necessary attention to the civil matters" and that, due to an upcoming deposition in the civil case, he needed assistance in obtaining representation. The letter does not state or suggest that he was indigent, was financially unable to pay for private representation or that any attorney had declined representation. (46a-47a)

Ordering the matter submitted without argument, the District Court ruled on the fee application and applied a 1.5 multiplier enhancement to the lodestar calculation, even though the attorney fee application and the declarations supporting it made no claim that enhancement was necessary for the determination of a reasonable fee, and the District Court did not find that the enhancement was necessary for a determination of a reasonable fee. (53a-56a) On appeal, the Ninth Circuit upheld the award of the multiplier, although the award (and the reasons for the award as stated by the District Court and affirmed by the Ninth Circuit) conflicts directly with the United States Supreme Court's mandate that such awards may be made only in rare cases where shown to be necessary for proper determination of a reasonable lodestar fee.

REASONS FOR GRANTING THE PETITION

I.

Where a law enforcement officer is found by a jury, on disputed facts, to have used deadly force in violation of the Fourth Amendment, is the officer barred, as a matter of law, from having the jury hear and determine a defense of qualified immunity.

This petition addresses the issue of whether a law enforcement officer, who has been found to have used excessive deadly force, is precluded, as a matter of law, from having a jury hear and determine a defense of qualified immunity. The Ninth Circuit here summarily decided that, as a matter of federal law, since the standard for use of deadly force was "clearly" set forth in *Tennessee v. Garner*, 471 U.S. 1 (1985), when a jury finds a violation of the Fourth Amendment by the use of deadly force, qualified immunity is not a defense. (2a) The ruling resurrects the pre-*Saucier* Ninth Circuit rulings under the circumstances in which deadly force was used. The Ninth Circuit now holds that the inquiry on the use of deadly force under the Fourth Amendment and the inquiry on the qualified immunity is one and the same and that a finding of excessive force bars application of qualified immunity.

The Ninth Circuit, through its unpublished and unauthored memorandum decision, upheld the District Court's clear error of law in its refusal to analyze the qualified immunity question in the context of prevailing United States Supreme Court authority. Under circumstances involving disputed facts, petitioner's affirmative defense was stripped away, on the sole basis that since a jury had found that the force used was unconstitutional, no defense would exist.

In *Saucier*, this Court mandated that the determination of whether the constitutional right at issue was "clearly established" requires the fact-finder to undertake a two-part analysis: (1) whether a reasonable officer would have believed that the use of force was appropriate, *and* (2) whether the officer had a reasonable, but mistaken, belief as to the facts establishing the existence of his need to use such force. *Saucier v. Katz, supra*, 533 U.S. at 205-206. Petitioner never had these questions answered. Without the questions being first submitted to the fact-finder for resolution (here, the jury), the District Court erred in concluding that no qualified immunity defense would shield petitioner from liability. The fact that the jury made a finding that excessive force was used *does not answer the qualified immunity question*, as *Saucier* clearly instructs:

> Yet, even if a court [or jury] were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. The same analysis is applicable in excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable.

Saucier at 206.

The Ninth Circuit has created conflict with this Court and other jurisdictions by finding that the law on the use of deadly force established in *Tennessee v. Garner* ends the inquiry into qualified immunity when a jury finds that unconstitutional force was used. (2a) The inquiry *has never been made* as to whether petitioner had a "reasonable, but

mistaken, belief as to the facts establishing the [right to use deadly force]," *Saucier* at 206. The District Court expressly noted that unresolved factual issues precluded it from ruling on a motion for directed verdict by Oberfelder. That recognition dictates that the defense should have been submitted to the jury for determination of whether petitioner was reasonably mistaken about the facts presented which caused him to use deadly force.[3]

In essence, the Ninth Circuit has reinstated the very rule that *Saucier v. Katz* sought to eliminate by this Court's reversal of then-prevailing Ninth Circuit authority: by holding that the jury's finding of excessive force, in a deadly force situation, equates to a finding that petitioner was not entitled to a qualified immunity defense. Perhaps this is because *Saucier* did not deal with the use of deadly force as did *Tennessee v. Garner*. However,

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[3] After recognizing the disputed facts, the District Court simply resolved the factual dispute itself by concluding that "this was not an instance in which petitioner reasonably, but mistakenly, believed that a suspect was likely to fight back, thus justifying the use of more force than in fact was needed. [ ]. Bertoli violated the law and has no immunity." (14a-15a) The District Court's conclusion deprived petitioner of the very benefit provided by Rule 50(a); that is, that where factual disputes exist, the judge will not supplant the jury's role by injecting his/her own credibility or factual determinations. The Court's error is underscored by the jury's inquiry, during deliberations, about how "self defense" factored into the equation, and was ultimately told it did not factor in at all; rather, the District Court instructed that if Bertoli "intentionally pulled the trigger" as opposed to the gun going off by mistake, then the "intentional" component of the excessive force instruction was met. The jury was not allowed to make the factual finding of whether Bertoli intended to pull the trigger *because of a reasonable mistake of fact: that he believed, reasonably, that Oberfelder was trying to run him down*. That is exactly the scenario envisioned by the "ample room" provided by qualified immunity.

Saucier's mandate cannot be read so narrowly to preclude its application to cases involving the use of deadly force.

The Ninth Circuit's decision conflicts with other Circuits. For example, in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *cert. granted,* 525 U.S. 1098 (1999), *cert. dism.*, 526 U.S. 1083 (1999) (which, prior to a settlement in the case, this Court granted certiorari to resolve a similar question to that resolved in *Saucier* only in the context of deadly force), the Seventh Circuit correctly held that "it is possible for the jury to find that, although the actual circumstances of the search did not justify the officer's behavior [use of deadly force when officer believed the suspect was armed, but was mistaken because the suspect was not armed at all], the circumstances *that appeared to the officer* would have justified [his conduct.] That is, the officer could make a constitutionally reasonable judgment based upon a factual misperception. . . . [I]t might be possible for the jury to resolve factual ambiguities so as to conclude that a constitutional violation took place even though it is *not* possible for the jury to resolve factual ambiguities so as to conclude that the violation was the product of an objectively unreasonable mistake." *Snyder v. Trepagnier*, *supra*, 142 F.3d at 800. The Fifth Circuit, in contrast to the Ninth, has published a Model Jury Instruction on the issue which provides:

> If, after considering the scope of discretion and responsibility generally given to police officers in the performance of their duties, and after considering all of the surrounding circumstances of the case as they would have reasonably appeared at the time of the arrest, you find from a preponderance of the evidence that plaintiff has proved either (1) that the defendant(s) was (were) plainly

> incompetent or that (2) he (they) knowingly violated the law regarding the plaintiff's constitutional rights, you must find for the plaintiff. If, however, you find that the defendant(s) had a reasonable belief that his (their) actions did not violate the constitutional rights of the plaintiff, then you cannot find him (them) liable even if the plaintiff's rights were in fact violated as a result of the defendant's(s') objectively reasonable action.

Pattern Jury Instructions: Fifth Circuit, Civil Cases, U.S. Fifth Circuit District Judges Association, 1999 Edition, Chapter 10, "Civil Rights" §10.1.

Petitioner urged that the jury be allowed to decide the issue of fact set forth in the Model Jury Instruction from the Fifth Circuit. If the jury indeed determined that petitioner was neither incompetent nor knowingly violated the law, consistent with *Malley v. Briggs*, 475 U.S. 335, 341 (1985) ("As the qualified immunity defense has evolved it provides ample protection to all but the plainly incompetent or those who knowingly violate the law"), and *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (same), then qualified immunity would apply. Petitioner proposed a qualified immunity instruction, which the District Court refused. Since the instruction was not allowed, petitioner was precluded from arguing the application of the affirmative defense to the jury and from asking the jury to make the factual determination necessary for the defense, including whether petitioner was plainly incompetent or knowingly violated the law.

The Ninth Circuit's denial of the petitioner's right to jury trial on the factual issues necessary to a determination of qualified immunity was due to a fundamental

misapplication of prevailing authority from this Court.[4] Review is warranted to ensure that other law enforcement officers who are called upon to use deadly force are not likewise stripped of the affirmative defense of qualified immunity.

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[4] Except for this case, the only post-*Saucier* excessive force decisions of the Ninth Circuit are upon review of summary judgments (where the presumption is for the plaintiff). In the Eighth Amendment context, the Ninth Circuit has applied the principles set forth in *Saucier*. Petitioner urged application of the opinion in *Jeffers v. Gomez*, 267 F.3d 895 (9th Cir. 2001) [use of force under the Eighth Amendment], wherein the Ninth Circuit recognized that denial of qualified immunity is dependent upon a finding that there was no reasonable, although mistaken, belief as to the facts presented to the officer at the time: "In discussing . . . the need for 'deference to the judgement of reasonable officers on the scene,' [ ] the [Supreme] Court said: . . . 'officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.'" *Jeffers*, 267 F.3d at 909, citing *Graham v. Connor*, 490 U.S. 386 (1989) and *Saucier, supra*, 533 U.S. 194. *See also Billington v. Smith*, 292 F.3d 1177, 1184 (9th Cir. 2002) [use of force under the Fourth Amendment decided upon summary judgment] (recognizing that the reason the Supreme Court overruled Ninth Circuit precedent in *Saucier* was "because an officer might be reasonably mistaken as to the facts justifying his actions *or* as to the law governing his actions, *so that an officer could use objectively excessive force without clearly violating the Constitution.*" (Emphasis added).)

II.

Whether 42 U.S.C. §1988 permits the award of a multiplier fee enhancement to a fee applicant, who otherwise acknowledges that his lodestar fee calculation represented a "reasonable rate for reasonable hours expended," because he was incarcerated at the time of filing his lawsuit and was appointed counsel by the District Court.

The question presented deals directly with the issue of the scope of fee enhancements and the authority of courts to create new criteria upon which to dramatically increase fee awards against individuals. Here, the specific rationale for a $334,000 fee enhancement against a law enforcement officer on top of a lodestar award of $638,109, was based upon a novel determination of the Ninth Circuit that a plaintiff's "incarceration" makes his case undesirable and justifies an enhancement. There was never a suggestion by Oberfelder, nor did the District Court find, that a fee enhancement was necessary for the establishment of a reasonable fee. This Court has not addressed the enhancement of 42 U.S.C. §1988 awards since its decision in *City of Burlington v. Dague*, 505 U.S. 557 (1992).

In *Blum v. Stenson*, 465 U.S. 886, 898 (1984), this Court held that the lodestar represents the "reasonable fee" and an applicant who seeks more than the lodestar recovery has the burden of showing that "such an adjustment is *necessary* to the determination of a reasonable fee." "The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence." *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002), *citing City of Burlington v. Dague, supra*, 505 U.S. at 562.

Under the authority of *Blum v. Stenson, supra*, an upward adjustment to the lodestar award can only be made when it is necessary, due to circumstances of the case, to produce a "reasonable fee." The upward enhancement to the already substantial lodestar attorney fee calculation sought by Oberfelder was predicated upon statements in his fee petition that he had "difficulty in obtaining counsel due to the undesirability of the case." (37a) The claim made by Oberfelder's petition, though not by declaration or statement of Oberfelder himself, was that "plaintiff tried to locate a lawyer to take his case on a contingency basis" and that "several lawyers turned him down." (*Id.*) However, the evidence supporting the request for a multiplier was a July 15, 1998 letter from Oberfelder to the District Court judge seeking appointment of counsel, which was not authenticated by Oberfelder in the fee application.[5] The letter does not state that Oberfelder's case was turned down by a single attorney. The letter stated that Oberfelder "was focusing on his criminal matters" with his "defense team" and that, "perhaps" when the criminal trial was over he would "be able to give necessary attention to civil matters." (46a) Other than the unauthenticated letter, Oberfelder offered no further evidence that any upward adjustment was necessary to the determination of what a reasonable attorney fee should be.

Sidestepping the necessary findings of *Burlington v. Dague,* the Ninth Circuit approved the enhancement awarded by the District Court based upon the "undesirability of the case" filed by an incarcerated prisoner. (5a-6a)

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[5] Petitioner's evidentiary objection to the letter was ignored by the District Court.

Equating "undesirability of the case" with Oberfelder's status as an incarcerated prisoner is just another way of saying that the case has a potentially higher risk of loss than a case where the plaintiff is not an incarcerated prisoner.

It has long been recognized that "the risk of losing a lawsuit [is not] an independent basis for increasing the amount of any otherwise reasonable fee for the time and effort expended in prevailing." *Pennsylvania v. Del. Valley Citizens' Council,* 483 U.S. 711, 725 (1986) In *Burlington v. Dague, supra,* this Court disapproved of a contingent risk fee enhancement and reaffirmed *Pennsylvania v. Del. Valley Citizens' Council, supra* (herein "*Del. Valley*"), holding that an enhancement for risk contingency is not permitted under federal fee shifting statutes. This Court did, however, find that the awarding of fee enhancements on top of lodestar awards "should be reserved for exceptional cases where the need and justification for such an enhancement are readily apparent and are supported by evidence in the record and specific findings by the courts. *Blum*, 465 U.S. at 896-901." *Del. Valley, supra*, 483 U.S. at 728. The issue squarely presented here is whether the incarcerated status of a civil rights plaintiff is the "exceptional circumstance" envisioned by this Court to justify a $334,000 fee enhancement on top of a $638,109 lodestar award.

The facts relied upon by the District Court and approved by the Ninth Circuit to meet the "exceptional circumstance" requirement include:

1. Oberfelder's incarceration;

2. A civil rights claim against law enforcement;

3. The small amount of medical bills diminishing potential for large damage award;[6]

4. Difficult factual issues;[7] and

5. Time consuming investigation involving risk of non-payment.[8]

(53a-56a)

"Incarceration" is a new criteria which has not been endorsed by this Court or the Ninth Circuit, before this case. Incarceration is the result of the culpability of Oberfelder's own conduct and should not be the basis for awarding additional monies against petitioner. Were this the standard, the more anti-social the behavior of a civil rights plaintiff, the more likely that a fee enhancement would be achieved. In analyzing the risk enhancement for taking on undesirable cases, the *Del. Valley* opinion noted the paradoxical outcome of such application, in that the

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[6] As Oberfelder's lawsuit was governed by the fee shifting statue of 42 U.S.C. § 1988, it is difficult understand how the damage award would effect the lodestar award of reasonable hours at reasonable rates.

[7] This Court in *Del. Valley* at 725-727, addressed the issue of factual difficulty of a case and the time consumed in prosecuting it:

> Moreover, when an attorney ultimately prevails in such a lawsuit, this success will be primarily attributable to his legal skills and experience, and to the hours of hard work he devoted to the case. These factors, however, are considered by the court in determining the reasonable number of hours expended and the reasonable hourly rate for the lodestar, and any further increase in this sum based on the risk of not prevailing would result not in a "reasonable" attorney's fee, but in a windfall for an attorney who prevailed in a difficult case.

[8] See Footnote 7, *ante*. Furthermore, this Court disapproved of a enhancement based upon risk of nonpayment. See *Dague*, *supra*.

enhancement results in those with the least likely chance of success being more "entitled" to a windfall fee, and a penalty on the losing party with the strongest and most reasonable defenses, "thus creating a perverse penalty for those least culpable." *Del. Valley*, *supra*, 483 U.S. at 719, *citing Laffey v. Northwest Airlines, Inc.*, 746 F.2d 4, 26 (1984). Here, the "perverse penalty" against petitioner because of Oberfelder's incarcerated status is $338,000, in a case where the jury determined that there was no basis for punitive damages against petitioner.[9]

The Ninth Circuit also approved the District Court's criteria that a factor justifying enhancement was the law enforcement status of the defendant. This criteria is not a criteria at all, as law enforcement is always a defendant in an excessive force claim. The endorsement of the "law enforcement status" of the defendant as an "exceptional circumstance" would suggest the award of a multiplier enhancement in every such case.

The only other reason proffered by the District Court for the enhancement was its appointment of civil counsel for Oberfelder. The difficulties Oberfelder complained of in obtaining counsel were the direct result of his criminal activity, and his decision to "focus on [his] criminal matters," not his civil case. In *Del. Valley*, this Court noted that the award of an enhancement "should be informed by the statutory purpose of making it possible for poor clients with good claims to secure competent help. Before adjusting

[9] The jury was asked to award punitive damages if it found that petitioner maliciously, intentionally, or recklessly caused the injury to Oberfelder, to which the jury responded, "No." (ER 522)

for risk assumption, there should be evidence in the record, and the trial court should so find, that without risk enhancement, plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant markets." *Id.*, at 730-731.

Oberfelder was not poor. There has never been a showing that he could not afford counsel. Rather, he was focusing on his criminal matters with his "criminal defense team" which "had precedence." (46a-47a) Oberfelder's letter to the District Court did not suggest that he was indigent. (*Id.*) While the District Court appointed counsel to Oberfelder's civil case, at a time when he was being represented by retained counsel in his criminal case, the District Court did not make any finding or statement that Oberfelder would not have been able to secure counsel without a fee enhancement, as required by *Del. Valley.*

This Court has recently visited the issue of whether excessive punitive damages awards may violate a defendant's due process rights under the Fourteenth Amendment of the U.S. Constitution. (*See, BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, __ U.S. __, 123 S.Ct. 1513 (2003).) In doing so, the Court held that the due process clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor. The imposition of an arbitrary "enhancement" to an attorney fee award where none is warranted, nor even claimed "necessary" for the determination of a reasonable fee, violates the "elementary notions of fairness enshrined in our constitutional jurisprudence [which] dictate that a person receive *fair notice not only of the conduct that will subject him to punishment but also of the severity of the*

penalty" facing him. *BMW of North America, Inc. v. Gore, supra*, 517 U.S. at 574.

In *Gore*, this Court, albeit reluctantly, reviewed capricious awards of punitive damages from a due process perspective and found that the defendant had not received adequate notice of the magnitude of the "penalty" that could be associated with its conduct. An arbitrary attorney fee multiplier meets none of the procedural safeguards afforded a tortfeasor against whom punitive damages are sought, and yet imposes an excessive "penalty" upon a losing defendant. Here the penalty was imposed even though the jury declined to award punitive damages, finding that petitioner did not "maliciously, intentionally or recklessly" cause the injuries to Oberfelder.

There is no reason why the multiplier fee enhancement which is not "necessary" to the determination of the lodestar fee should not be analyzed with the same "suspicious judicial eyebrow" as an excessive punitive damage award. (*See, Gore* at 583, *citing TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 481 (1993).)

CONCLUSION

A law enforcement officer confronted with split second decisions in life threatening circumstances should have the opportunity to present a defense of qualified immunity, even if a jury finds that he used excessive force. The Ninth Circuit has here created an exception to this Court's holding in *Saucier v. Katz* which would otherwise be applicable in all deadly force cases. As such, it has stripped the law enforcement officer of a qualified immunity protection without allowing the jury to consider

whether the officer was acting under a mistake of fact affecting his right to use the force used, was incompetent or knowingly violated the law.

Without any suggestion that the substantial lodestar fee award was unreasonable, the Ninth Circuit has created a new basis for a multiplier fee enhancement arising from the incarcerated status of a criminal defendant/civil rights plaintiff. To allow such will greatly expand the potential liability of law enforcement officers.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH R. OBERFELDER, Plaintiff-Appellee, v. **CHRISTIAN A. BERTOLI,** Defendant-Appellant, and **CITY OF PETALUMA; PETALUMA POLICE DEPARTMENT, DAVID KAHL, Sergeant; COUNTY OF SONOMA; SHERIFF'S DEP'T SONOMA COUNTY; MARK IHED, Sheriff; DAVID BERTOLI, Deputy; DENNIS DEWITT, Chief of Police,** Defendants.	No. 01-17302 D.C. No. CV-98-01470-MHP/PJH **MEMORANDUM*** (Filed Jun. 4, 2003)

KENNETH R. OBERFELDER, Plaintiff-Appellee, v.	No. 02-15423 D.C. No. CV-98-01470-MHP

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

CHRISTIAN A. BERTOLI,
Defendant-Appellant,
and
COUNTY OF SONOMA,
Defendant.

Appeals from the United States District Court
for the Northern District of California
Marilyn H. Patel, District Judge, Presiding

Argued and Submitted March 10, 2003
San Francisco, California

Before: **KOZINSKI**, **GRABER** and **BERZON**, Circuit Judges.

1. Because the jury instruction precisely tracked the Fourth Amendment's reasonableness requirement, *see Graham v. Connor,* 490 U.S. 386, 396-97 (1989), and the jury found that plaintiff "ha[d] prove[d] by a preponderance of the evidence that defendant . . . used excessive force," Bertoli is not entitled to qualified immunity under *Saucier*'s first prong. *See Saucier v. Katz,* 533 U.S. 194, 201 (2001) (asking whether the facts alleged show that "the officer's conduct violated a constitutional right").

Nor is Bertoli entitled to immunity under *Saucier*'s second prong. *See id.* (asking whether "the right was clearly established"). The law had been clearly established by the time of the shooting that police officers may not use deadly force "[w]here the suspect poses no immediate threat to the officer and no threat to others." *Tennessee v. Garner,* 471 U.S. 1, 11 (1985). Indeed, defendant admits that he knew this was the law.

The district court did not err in denying Bertoli's motion for a new trial based on the Supreme Court's intervening *Saucier* decision.

2. The district court did not abuse its discretion in admitting Deyerl's undisclosed testimony to rebut Bertoli's new representation at trial that he was standing in front – not to the side – of Oberfelder's car. *See Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.,* 944 F.2d 597, 601 (9th Cir. 1991).

3. Nor did the district court abuse its discretion in admitting Clark's testimony about what a reasonable officer would have done under the totality of the circumstances. *See* Fed. R. Evid. 704; *Taylor v. Burlington N. R.R.,* 787 F.2d 1309, 1315-16 (9th Cir. 1986). The testimony was admitted, not to inject into the trial the issue of "officer's negligence," but to help the jury evaluate the reasonableness of Bertoli's actions – from the moment he decided to confront Oberfelder on his own, with gun drawn, to the firing of the weapon. *See Graham,* 490 U.S. at 396-97.

The district court likewise did not abuse its discretion in rejecting Bertoli's proposed "least intrusive force" instruction to counteract the alleged prejudicial effects of Clark's testimony. *See Floyd v. Laws,* 929 F.2d 1390, 1394 (9th Cir. 1991). The court's instruction "fairly and adequately," *id.,* alerted the jury that "[a] law enforcement officer has the right to use such force as is reasonably necessary under the circumstances to make a lawful arrest" and that the reasonableness inquiry "must embody allowance for the fact that police officers are often forced to make split-second judgments."

4. The district court did not abuse its discretion when it concluded that introducing evidence about Oberfelder's fears of the Colombian drug cartel would be unduly prejudicial, outweighing whatever probative value the evidence might have. *See* Fed. R. Evid. 403; *Rogers v. Raymark Indus., Inc.*, 922 F.2d 1426, 1430 (9th Cir. 1991). Whether Oberfelder thought the gun-bearer was a drug lord or a reckless cop has little relevance to the reasonableness of Bertoli's actions in effectuating the arrest and in firing his weapon after his attempt to apprehend Oberfelder failed. Admitting evidence about Oberfelder's alleged association with illegal narcotics would run the risk of misleading the jury into focusing on plaintiff's alleged bad acts at the expense of the main issues at trial.

5. Bertoli's argument that the judgment should have been reduced by the amount of medical expenses paid for by the County Medical Services Program consortium is not properly before us. The district court relied on Cal. Gov't Code § 985(b) to exclude from the trial evidence about any "collateral source payment paid or owed to or on behalf of a plaintiff." *See* Cal. Gov't Code § 985(b). Nevertheless, the court expressly invited Bertoli to file a motion later to "request a posttrial hearing for a reduction of the judgment." *See id.* Bertoli failed to do so.

The record is unclear about the composition of the consortium and, hence, the applicability of section 985(b), *see id.* § 985(a)(1)(A) (defining "collateral source payment" to include "[t]he direct provision of services . . . by nonfederal publicly funded health service providers"). But Bertoli doesn't challenge on appeal the district court's reliance on section 985(b) or the posttrial procedure set forth in that provision. Although Bertoli's brief extensively discusses the substance of the collateral source rule, it contains no

discussion or citation regarding the posttrial procedure established by section 985(b) and offered by the district court, which Bertoli failed to pursue. The issue is therefore waived. *All Pac. Trading, Inc. v. Vessel M/V Hanjin Yosu,* 7 F.3d 1427, 1434 (9th Cir. 1993).

6. Finally, the district court did not abuse its discretion in awarding costs and attorney's fees to Oberfelder. *See Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983). With respect to the costs and the lodestar calculations, the district court made detailed findings of fact and reduced the requested amounts where appropriate. Although the district court noted that some of the fees and expenses were toward the high end, it concluded that the expenditures, as adjusted, were not excessive given the nature of the case and the quality of counsel's legal advocacy. We cannot say that these factual findings are clearly erroneous. *See Richard S. v. Dep't of Developmental Servs.,* 317 F.3d 1080, 1086 (9th Cir. 2003).

While there is a strong presumption that the lodestar represents a reasonable fee – a presumption of which the district court was aware – the district court did not abuse its discretion in applying a 1.5 multiplier. *See Bouman v. Block,* 940 F.2d 1211, 1235 (9th Cir. 1991). It found that the case was particularly undesirable for numerous reasons that were inadequately reflected in the lodestar. The undesirability of the case is at least partially confirmed by Oberfelder's difficulty in obtaining legal representation and the consequent need for the district court to appoint pro bono counsel. *See Guam Soc'y of Obstetricians & Gynecologists v. Ada,* 100 F.3d 691, 697-99 (9th Cir. 1996) (holding that undesirability of the case and plaintiff's difficulty in obtaining legal counsel justified the application of a 2.0 multiplier). For the reasons given by

the district court, and because market forces are not at work in a case where counsel is appointed, *cf. id.* at 698; *see also id.* at 712-13 (Kozinski, J., dissenting in part), the district court did not clearly err in concluding that unusual circumstances existed that justified an enhancement, *see id.* at 696 (majority op.).

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER,
Plaintiff,
v.
CITY OF PETALUMA et al.,
Defendants.
/

No. C-98-1470 MHP

MEMORANDUM AND ORDER

(Filed Oct. 9, 2001)

On May 11, 2001, a jury found that defendant Christian Bertoli ("Bertoli") had used excessive force in arresting plaintiff Kenneth Oberfelder ("Oberfelder") and awarded Oberfelder $100,000 in damages. Bertoli now moves the court for a new trial. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court now enters the following memorandum and order.

DISCUSSION

Bertoli argues the court erred in: 1) denying him qualified immunity on summary judgment and in refusing to instruct the jury on qualified immunity as an affirmative defense; 2) admitting over objection new expert opinion testimony from accident reconstructionist Eric Deyerl ("Deyerl") on Bertoli's line of sight and position; 3) admitting over objection testimony from police practices expert Clark that Bertoli negligently or unreasonably placed himself in the position he was in when Oberfelder decided to flee; 4) failing to instruct the jury that a peace officer is not required to use the least intrusive force, while

allowing evidence from police practices expert that alternatives were available to shooting Oberfelder; 5) admitting evidence of Oberfelder's medical expenses but not of the amounts paid by the County of Sonoma and not by Oberfelder; and 6) excluding evidence that Oberfelder feared for his life beginning in 1988 due to threats from Colombian drug cartel members.

I. Qualified Immunity

In February 2000, this court denied Bertoli's motion for summary judgment as to qualified immunity on the basis of *Katz v. United States*, 194 F.3d 962, 968 (9th Cir. 1999) ("the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim"). At trial, the court similarly refused to instruct the jury regarding qualified immunity as an affirmative defense.

Katz is no longer good law. In *Saucier v. Katz*, 531 U.S. 991, 121 S. Ct. 2151 (2001), the Supreme Court announced a new standard for qualified immunity. The Court rejected the Ninth Circuit's rule that the excessive force and qualified immunity inquiries are co-extensive. The Court held that the standard requires a two-step inquiry. First, the court must ask: "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier*, 121 S. Ct. at 2156. If the answer is no, the officer is awarded qualified immunity. If the plaintiff can make out a violation, the next step is "to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific

context of the case, not as a broad general proposition. . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 2156. "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 2156-57.

The Court stated:

> This is not to say that the formulation of a general rule is beside the point, nor is it to insist the courts must have agreed upon the precise formulation of the standard. Assuming, for instance, that various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand, the officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on one verbal formulation of the controlling standard.

Id. at 2157.

The Court reiterated its holding from *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865 (1989) that "the reasonableness of the officer's belief as to the appropriate level of force should be judged from [an] on-scene perspective," taking into account the fact that officers are often required to make split-second decisions. *Id.* at 2158, citing *Graham*, 490 U.S. at 396, 397. The court stated:

> Graham sets forth a list of factors relevant to the merits of the constitutional excessive force claim, 'requir[ing] careful attention to the facts and circumstances of each particular case, including the

> severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.' If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.

Id. at 2158 (quoting *Graham*, 490 U.S. at 396).

The Court then added its new wrinkle to qualified immunity, reasoning that as the "concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct, . . . if the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense." *Id.* In other words, even if the court were to hold or a jury were to find that an officer violated the Fourth Amendment by using excessive force, the officer would still be granted immunity for reasonable mistakes as to the legality of his action. *Id.* at 2158-59.

The Court held that the officers in *Saucier* had qualified immunity when they arrested a protestor at a speech by Vice President Gore as the protestor was about to unfurl a banner for the humane treatment of animals, and then shoved him into a police van. The Court stated:

> In the circumstances presented to this officer, which included the duty to protect the safety and security of the Vice President of the United States from persons unknown in number, neither respondent nor the court of Appeals has identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did,

> nor are we aware of any such rule. Our conclusion is confirmed by the uncontested fact that the force was not so excessive that respondent suffered hurt or injury. On these premises, petitioner was entitled to qualified immunity, and the suit should have been dismissed at an early stage in the proceedings.

Id. at 2160.

Applying the *Saucier* test to Bertoli, it is clear that taking the facts in the light most favorable to Oberfelder, Oberfelder has shown Bertoli's conduct violated a constitutional right, namely the right not to be shot by a police officer when there is no immediate threat of injury to the officer or others. *See Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (officer may only use deadly force where he reasonably fears a risk of death or serious bodily injury to himself or others). The jury clearly found Oberfelder's version of events more credible. To find Bertoli used excessive force, the jury must have found that neither Bertoli nor anyone else was in immediate danger. Indeed, there was no one else on the street at the time, so Bertoli's concern could not have been for bystanders.

But, even taking Bertoli's facts, Bertoli acted unreasonably. Bertoli argued he fired in self-defense, believing he was about to be rammed by Oberfelder's car. He contended that he was standing in front of the car as it began to move forward, stepped to the side several feet as it approached, took aim through the front-driver's side window and used the pillar post between the front and back doors as a line of sight. It is clear that not only could Bertoli have stepped to the side to avoid the car, but that he in fact did so. Given the speed of Oberfelder's vehicle, which Oberfelder's expert estimated was at most 14 miles

per hour, and Bertoli's location to the side of the car, a reasonable officer in Bertoli's position would have recognized that deadly forced [sic] was not called for or permitted under the law. This is particularly true as the car was turning away from Bertoli when he pulled the trigger. *Cf. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (officers denied qualified immunity as when they shot Curnow, "Curnow did not point [his] gun at the officers and apparently was not facing them when they shot him the first time").

At the hearing on this matter, Bertoli admitted that he was not mistaken as to the state of the law at the time he shot Oberfelder, i.e., whether the law permitted him to shoot Oberfelder under the circumstances as they were. Therefore, he fails to meet *Saucier's* second prong. *See Saucier*, 1212 S. Ct. at 2158 ("if the officer's mistake as to what the law requires is reasonable . . . the officer is entitled to the immunity defense"). In fact, as Bertoli agrees, the law was clearly established here. A reasonable officer would have understood that when a car driven by a fleeing felon is passing him by and moving away, with no one on the street except the officer and the suspect, as the jury clearly found, it is not permissible to use deadly force. *See Garner*, 471 U.S. at 11, 105 S. Ct. at 1701 (officer may use deadly force to apprehend a fleeting suspect only when the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others); *Acosta v. City and County of San Francisco*, 83 F.3d 1143, 1146 (9th Cir. 1996) ("a reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead-center of the car, would have recognized that he could avoid being injured when the car moved slowly, by simply

stepping to the side"); *Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (holding that while "a felon escaping in a car [who] aims for a police officer . . . may be shot to protect the life of the officer," *id.* at 235, qualified immunity determination turns on disputed issue of whether car actually presented threat of serious physical harm to officer, as officer moved out of path of car without being struck and it was unclear just how quickly car was moving toward officer, as from complete stop, even with accelerator floored, car had moved less than ten feet when officer opened fire on driver); *Klein v. Ryan*, 847 F.2d 368, 375 n.9 (even using pre-*Garner* standard, deadly force was not necessary to prevent death or great bodily harm to peace officer or other person when officer, even with reasonable belief that driver was trying to hit him with car, easily moved out of path of vehicle); *cf. Fraire v. City of Arlington*, 957 F.2d 1268, 1276 (holding officer was entitled to qualified immunity when with officer "on foot and yelling 'Police, stop!', Fraire drove straight toward [officer] showing no sign of attempting to stop or drive around him" and officer waited until last possible moment to shoot driver); *Hinton v. Lee*, 1995 WL 295296, *1, *5 (E.D. La. 1995) (holding officers were entitled to qualified immunity when police shot suspect while he was attempting to escape in car; suspect first reversed into and hit one officer and then drove toward another officer; driver was shot at twice after he hit first officer, then shot at twelve more times when he was 3-4 feet from hitting second officer); *Drewitt v. Pratt*, 1992 WL 516032, *1, *5 (E.D. Va. 1992) (holding undercover officer who approached vehicle with gun drawn and shot driver was entitled to qualified immunity even where driver did not realize officer was law enforcement official when truck accelerated toward officer, hit him and tossed him over front fender onto hood; "even if the officer's

actions leading up to the shooting had been negligent, no constitutional violation occurs if the officer had reason to believe there was a threat of serious physical harm when he fired his weapon").

Bertoli argues that under the circumstances as he perceived them at the time of the shooting, he was reasonably mistaken as to his right to use force. In support, he cites *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998). In *Snyder*, the officer, Trepagnier, shot Snyder in the back as he fled, believing erroneously that Snyder had a gun. The jury found that Trepagnier had used excessive force because Snyder had no gun, but that Trepagnier "reasonably believed Snyder had a gun so that, given the 'uncertain facts' Trepagnier possessed, 'it cannot be said that he knew he was violating a person's rights.'" *Id.* at 801 (citation omitted). Thus, it's clear that *Snyder* applied a subjective test, asking whether the officer on the scene reasonably believed that Snyder was armed, not whether a reasonable officer would believe that he could shoot under the circumstances. As Oberfelder pointed out at the hearing, under *Saucier* "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 121 S. Ct. at 2156. This is not a subjective inquiry. The Fifth Circuit's standard in *Snyder* is not the law of the land. The proper vantage is that of a reasonable officer under the circumstances as they existed, not that of the officer who used excessive force under the circumstances as he perceived them. This was not an instance in which Bertoli reasonably, but mistakenly, believed that a suspect was likely to fight back, thus justifying the use of

more force than in fact was needed. *Saucier*, 121 S. Ct. at 2158. Bertoli violated the law and has no immunity.

It must be remembered that Bertoli bears the burden of proof as to qualified immunity; the defense is not merely the flip-side of the excessive force inquiry. Based on the evidence, no reasonable jury given an instruction as to qualified immunity could find facts supporting the qualified immunity defense, let alone find that Bertoli had met his burden of proof. No reasonable jury could find that Bertoli was acting under a reasonable mistake as to the amount of force that was legal under the circumstances. This conclusion is "confirmed by the uncontested fact that [unlike in *Saucier*] the force was . . . so excessive that respondent suffered hurt or injury." *Saucier*, 121 S. Ct. at 2160. The court did not err in refusing to submit the question of qualified immunity to the jury, nor did it err in refusing to award qualified immunity on its own.

II. Testimony of Eric Deyerl

Bertoli contends that Deyerl, an accident reconstructionist, was erroneously permitted to testify at trial that Bertoli must have been 17 feet to the left of the car when he fired his gun, and that he was never in front of the case. Bertoli also claims that the court erred in permitting Deyerl to use a newly created exhibit at trial. Bertoli claims this testimony and the chart should have been excluded because they were not disclosed to him before trial.

Oberfelder responds that Bertoli's testimony regarding his position just before the shooting changed considerably at trial from his earlier statements. Bertoli had previously told investigators and testified at deposition

that he was to the side of the car, or in front of the left-hand side of the grill. At trial, Bertoli claimed he was standing directly in front of the grill when he decided to fire.

Bertoli disputes that he changed his testimony at trial, arguing that at deposition he testified that he had a line of sight through the driver's side window when he saw Oberfelder shift the car into gear. In fact, his deposition transcript, cited by defense, does uphold this view. At the same time, at trial Oberfelder pointed out direct quotes from Bertoli from his interview the night of the crime and at deposition showing how Bertoli changed his story as the trial approached and then again at trial to tell a story putting himself in increasing danger.

Bertoli had the opportunity to cross-examine Deyerl and debunk Deyerl's conclusions. He was not prejudiced by the admission of Deyerl's testimony. If there was any prejudice, it was created by Bertoli's failure to maintain a reliable story.

III. Other Grounds for New Trial

For the reasons stated at the hearing on this matter, the court rejects Bertoli's other arguments for a new trial. The cases Bertoli offers to support his other contentions do not show that the court's evidentiary rulings were wrong, let alone should be the basis for a new trial. The court dealt with all these contentions amply before, during and at the end of the trial. The court will not revisit its earlier decisions.

CONCLUSION

For the foregoing reasons, the court hereby DENIES defendant's motion for a new trial.

IT IS SO ORDERED.

Dated: Oct. 9, 2001

/s/ Marilyn Hall Patel
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER
Plaintiff,
vs.
CITY OF PETALUMA, et al.,
Defendants.

No. C-98-1470 MHP

MEMORANDUM AND ORDER

(Filed Feb. 10, 2000)

On June 27, 1996, Petaluma Deputy Sheriff Christian Bertoli shot plaintiff Kenneth Oberfelder, who was suspected of narcotics violations. On June 20, 1997, plaintiff filed a complaint in the Sonoma County Superior Court alleging various tort and civil rights causes of action against the County of Sonoma, the Sonoma County Sheriff's Department ("SCSD"), Sheriff Ihde and Deputy Sheriff Bertoli.[1] Defendants removed the action to this court on April 10, 1998, pursuant to 28 U.S.C. section 1441(b). Now before the court is defendants' motion for summary judgment.

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[1] Plaintiff also named as defendants the City of Petaluma, Petaluma Police Department, Petaluma Chief of Police Dennis DeWitt, and Petaluma Sergeant David Kahl. Plaintiff voluntarily dismissed the Petaluma defendants on March 5, 1999 after the matter had been removed to federal court.

BACKGROUND[2]

I. The Investigation and the Shooting

Beginning in January 1996, the SCSD conducted an investigation of Kenneth Oberfelder, a fugitive from Idaho since 1988 who was suspected of narcotics sales. Sonoma County Deputy Sheriff Christian Bertoli began working on the case in April 1996 and conducted surveillance concerning Oberfelder on approximately five to six occasions between April and June 27, 1996. On June 26, 1996, the SCSD obtained search warrants for three locations as part of the investigation of Oberfelder, including one for a residence at 1287 San Rafael Drive in Petaluma.

On June 27, 1996, Sonoma County Detective David Anderson led a briefing at the narcotics office about the Oberfelder investigation. This briefing covered a planned narcotics transaction between Oberfelder and a confidential informant for two kilograms of cocaine. The police planned to serve the three search warrants after the meeting. According to defendants, the briefing included a discussion about the fact that Oberfelder had an outstanding arrest warrant from Idaho and was a fugitive.

After the briefing, Deputy Bertoli conducted surveillance of the meeting between the confidential informant and Oberfelder in the parking lot of a McDonald's in the early afternoon. The two discussed the potential sale of one, two or three kilograms (6.6 pounds) of cocaine. The informant told Oberfelder that he was going to a hotel to

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[2] Unless otherwise noted, all facts are taken from the joint statement of undisputed facts submitted by the parties on November 22, 1999.

count his money and that he would contact Oberfelder later via Oberfelder's cellular phone. Oberfelder left McDonald's, proceeded to the Petaluma Hotel and then to the residence at 1287 San Rafael Drive in Petaluma. Six vehicles assisted in the surveillance and the law enforcement included Deputies Jerry Niess, Matt McCaffrey, and Kenneth Bertoli, Detective David Anderson, Sergeant Bruce Rochester, and U.S. Marshal John Stafford. During this drive Sergeant Rochester announced that the officers should arrest Oberfelder after he exited the car but before he entered the home due to safety considerations.

Oberfelder arrived at 1287 San Rafael Drive, backed his Volvo into the driveway, put the car in park and left the engine running. Bertoli parked his vehicle, an unmarked truck according to plaintiff, near a white Mercedes that was parked in front of 1287 San Rafael Drive. Plaintiff contends he was alarmed when Bertoli screeched to a stop. Bertoli exited his vehicle and drew his gun. Bertoli was clothed in a black jersey shirt with "SHERIFF" in gold lettering on the back and the front. According to the parties' memoranda, he also wore jeans, a baseball cap, and a sheriff's badge on his hat and belt. Plaintiff contends that Bertoli did not communicate his plans to the other officers, as was expected of him by Sergeant Rochester, and did not wear a bullet-proof vest. Plaintiff further claims that Bertoli violated standard peace officer procedures by failing to maintain a position of cover or concealment and running into the middle of the road.

Bertoli ran in the street toward Oberfelder's Volvo with his weapon pointed at Oberfelder. According to defendants, Bertoli shouted "Sheriff's Department, freeze" two or three times and "Stop the car." However, Oberfelder contends that he did not hear Bertoli's shouts and feared

that he could have been "set-up" for a "rip-off" of his cocaine. Oberfelder put the car into gear and drove out of the driveway. Defendants claim that Oberfelder exited at a high rate of speed, while plaintiff uses an expert witness to show that Oberfelder exited at five to thirteen miles per hour.[3] Defendants also assert that Oberfelder's vehicle came within ten to twelve feet of Bertoli at the time the shot was fired. Bertoli shot at the car, and a bullet struck through the driver's side rear window, passed through the driver's seat and hit Oberfelder. Oberfelder was arrested and transported to the hospital.

II. Claims Against the County and Sheriff Ihde

Plaintiff attacks the actions of the SCSD and Sheriff Ihde based on the management of the department, particularly the issuance of department policies, lack of training for specific situations, and ratification of the actions of Bertoli. Plaintiff contends that policies do not exist related to an arrest made pursuant to an out of state warrant or the use of a single officer arrest. Further, plaintiff claims that Bertoli was not trained in approaching a

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[3] Based on expert testimony, plaintiff alleges that Oberfelder's car was moving five to seven miles per hour when it exited the driveway and ten to thirteen miles per hour as it drove away from Bertoli. Defendant argues that these facts do not meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure. However, the Federal Rule of Evidence 705 states "[t]he expert may testify in terms of opinion or inference and give his reasons therefore without prior disclosure of underlying fact or data unless the court requires otherwise." *Bulthuis v. Rexall Corp.*, 789 F.2d 1315, 1317 (9th Cir. 1986). At this time, the court does not require further documentation of the equations and facts used to calculate the approximate speed of the Volvo.

suspect in a motor vehicle, drawing his gun when approaching a vehicle, and shooting at a moving vehicle.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, summary judgment shall be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial . . . since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n.*, 809 F.2d 626, 630 (9th Cir. 1987).

The moving party bears the initial burden of identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. The burden then shifts to the nonmoving party to "go beyond the pleadings, and by [its] own affidavits, or by the 'depositions, answers to interrogatories, or admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324 (citations omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (a dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"). The moving party discharges its burden by showing that the nonmoving party has not disclosed the existence of any "significant probative evidence tending to support the complaint." *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968).

The court's function on a motion for summary judgment is not to make credibility determinations. *See Anderson*, 477 U.S. at 249. The inferences to be drawn from the facts must be viewed in a light most favorable to the party opposing the motion. *See T.W. Elec. Serv.*, 809 F.2d at 631.

DISCUSSION

Plaintiff alleges four claims, two based on state tort claims and two under 42 U.S.C. section 1983 claims for deprivation of rights guaranteed by the Fourth Amendment. This action is before the court on federal question grounds, so the court's jurisdiction turns on plaintiff's section 1983 claims. The court thus addresses the section 1983 claims first.

I. Use of Force

In the first claim, plaintiff contends that defendant Bertoli used excessive force to effectuate the arrest in violation of plaintiff's Fourth Amendment right to be free from an unreasonable seizure. *See Robins v. Harum*, 773 F.2d 1004, 1007 (9th Cir. 1985). While defendant was attempting to flee from the police, a seizure occurred because an officer used a show of authority or force which caused the fleeing suspect to stop his attempted escape. *See Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989). Because the suspect was seized, the actions of the sheriff are governed by the Fourth Amendment.

The Fourth Amendment permits police to use only such force as is objectively reasonable under the circumstances. *See id.* at 397. An officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or

serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *see also Graham*, 490 U.S. at 396. All determinations of unreasonable force "must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. The reasonableness of force is analyzed in light of such factors as the requirements for the officer's safety, the motivation for the arrest, and the extent of the injury inflicted. *See White v. Pierce County*, 797 F.2d 812, 816 (9th Cir. 1986).

The reasonableness of the force used to effectuate an arrest is traditionally a question of fact for the jury. *See, e.g., White*, 797 F.2d at 816. However, it is possible for defendants to prevail on summary judgment if, after resolving all factual disputes in favor of the plaintiff, the court concludes that the officer's use of force was objectively reasonable under the circumstances. *See Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Plaintiff asserts that Deputy Bertoli's actions were not reasonable because the car was moving only five to ten miles per hour, Oberfelder was turning the vehicle away from the officer, and Oberfelder was shot in the back. Defendants emphasize that the incident occurred in a matter of seconds, that Oberfelder exited the driveway quickly, and that Bertoli was in the street where the car came within ten feet of him. These divergent accounts of the incident reveal that there is a triable issue for the court. Defendant has not demonstrated clearly that a

reasonable officer in Bertoli's situation would fear the safety of himself or others.[4] Viewed in the light most favorable to the plaintiff, there is a genuine issue for trial and a reasonable jury could return a verdict for the plaintiff. Thus, the court cannot grant defendant's motion for summary judgment on the 1983 claim against Bertoli in his official capacity.[5]

A. Personal Immunity

Individual defendants performing discretionary functions may be entitled to qualified immunity, shielding them from civil damages when sued in their personal capacity. *See Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). *Harlow* qualified immunity shields public officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would be aware.

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[4] Defendant's assertion appears to be only that Deputy Bertoli acted because he feared for his own safety, and not the safety of others. While some remarks by Bertoli after the incident indicate a possible concern for others in the area, there are no specific claims made that Bertoli acted to protect others. Further, simply alleging the protection of others, without factual support that others were in danger of serious harm or death, is not enough to justify the use of deadly force. If it were, all fleeing felons could be shot by police due to the possibility of the harm to others, a proposition rejected by the Supreme Court. *See Garner*, 471 U.S. at 11.

[5] Plaintiff's original complaint lists both Bertoli and the County of Sonoma as defendants to the first claim, excessive force by Bertoli. Since Bertoli is being sued in his official capacity, he and the County of Sonoma are one and the same. *See Graham*, 473 U.S. at 166 (official capacity suits are essentially suits against the state, and should be treated as such).

Anderson, 483 U.S. at 638. In delimiting the applicability of *Harlow* immunity, the Ninth Circuit has held that "regardless of whether the [alleged] constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not 'clearly established' or the officer could have reasonably believed that his particular conduct was lawful." *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991).

In *Romero*, the Ninth Circuit held that the usual summary judgment standard is necessarily altered by the policies underlying *Harlow* immunity. *Romero*, 931 F.2d at 628. The court, therefore, must apply the specialized summary judgment standard articulated in *Romero* as to this portion of defendants' motion.

When considering motions for summary judgment based on qualified immunity defense, a court must make an initial determination as to whether the law at issue was clearly established at the time the complained of conduct occurred. *See id.* at 627. Such a determination is made through a three-part inquiry, in which the court must: (1) identify the specific right allegedly violated; (2) determine whether that right was so clearly established as to alert a reasonable officer to its parameters; and (3) ultimately determine whether a reasonable officer could have believed the conduct at issue was lawful. *See id.* at 627-28.

Though the defendants move for summary judgment on qualified immunity grounds, "the plaintiff bears the burden of proof that the right allegedly violated was clearly established at the time of the alleged misconduct," and, if that burden is met, defendants may still prevail if they prove that their actions were nonetheless reasonable.

Id. at 627. If the court determines, as a matter of law, that the law was not clearly established, the inquiry ends and defendants are entitled to summary judgment. *See id.* at 628. If the court finds that the law was clearly established, the court must then determine, still as a matter of law, whether a reasonable officer would have known that her conduct violated those rights. *See id.*

Plaintiff alleges that his Fourth Amendment right to be free from an unreasonable seizure was violated by Bertoli's use of excessive force. Defendants argue that the force used by Bertoli was not excessive because Bertoli feared for his life during the confrontation. The law surrounding the use of deadly force is clearly established: an officer may only use deadly force where he reasonably fears a risk of death or serious bodily injury to himself or others. *See Garner*, 471 U.S. at 3. However, defendants have not demonstrated that a reasonable officer would have believed that deadly force was necessary in this case. The Ninth Circuit has repeatedly held that "the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Katz v. United States*, 194 F.3d 962, 968 (9th Cir. 1999) (citing cases). In fact, this court believes that using immunity, an "affirmative defense," in an excessive force case is a misreading of section 1983 law. In excessive force claims, immunity is the flipside of the reasonable force issue. Immunity is an affirmative defense and grew out of cases where public officials relied upon state statues [sic], regulations or policies in taking particular actions. The immunity defense has developed to include a wide range of conduct relying on clearly established law or institutional policies. However, excessive force cases present a different scenario. Usually

the officer is not relying on departmental policy or regulations, but is contending that his conduct was reasonable. It is plaintiff's burden in these cases to establish that the officer's conduct was not objectively reasonable. If plaintiff meets his burden, the burden of producing evidence shifts to the officer to show that his conduct was objectively reasonable. Plaintiff always retains the burden of proof. It is not clear to the court why defendants in these circumstances persist in offering an affirmative defense upon which they have the burden of proof. *Katz* finally dictates clearly that this is the correct analysis.

Accordingly, because reasonableness is *the* issue and there are material facts in dispute supported by admissible evidence, the issue of excessive force in this case cannot be determined on summary judgment, but is a triable issue of fact for the jury to determine. Therefore, the court denies summary judgment as to Bertoli's immunity from suit.

II. Oversight, Policy and Training by the Sonoma County Sheriff's Department and Sheriff Ihde

Plaintiff alleges in his second claim that his Fourth Amendment right to be free from an unreasonable seizure was violated by the improper management, policies, and training of officers by the SCSD and Ihde. However, this claim is predicated on a finding of excessive force by Bertoli. Therefore, the court will not address this claim until a jury has determined whether Bertoli's use of force was excessive in the circumstances.

III. Tort Causes of Action

Plaintiff brings two tort claims under state law against all defendants: intentional infliction of emotional distress and assault and battery. Defendants argue that plaintiff's state law tort claims are not viable as a matter of law because an officer may use deadly force if he reasonably fears for the life or safety of himself or others. California Government Code section 820.2 states that a public employee is not liable for an injury resulting from his act or omission where the act was the result of the exercise of the discretion vested in him, and the public entity is not liable where the employee is immune from liability per California Government Code section 815.2. Plaintiff rebuts by arguing that the officer's fear was not reasonable, so deadly force was not necessary.

Decisions made by officers effectuating an arrest are not what would be considered a traditional discretionary activity by a government official. More commonly, discretionary activity covers individuals who create official policies on behalf of the government. Courts in California have applied California Government Code sections 820.2 and 815.2 in cases where an officer's discretionary decision is challenged. *See Scruggs v. Haynes*, 252 Cal. App. 2d 256, 264-68 (1967); *see also Martinez et al. v. County of Los Angeles et al.*, 47 Cal. App. 4th 334, 349 (1996); *Price et al. v. County of San Diego et al.*, 990 F.Supp. 1230, 1244 (S.D. Cal. 1998); *Reynolds v. County of San Diego*, 858 F.Supp. 1064, 1074 (S.D. Cal. 1994). However, the courts have held with equal force that section 820.2 immunity does not provide a defense to an officer who uses unreasonable or excessive force. *Scruggs*, 252 Cal. App. 3d at 266. The other cited cases discussing section 820.2 immunity in the context of excessive force cases suffer from the same

confusion that this Circuit's section 1983 cases suffered before *Katz*. They suggest that the immunity applies except where there is excessive force. But, if there is excessive force, then there is liability. *Id.* at 264 ("California cases have consistently held that a peace officer making an arrest is liable to the person arrested for using unreasonable force."). If excessive force is not proven, there can be no liability and, hence, no need for an affirmative defense of immunity.

In any event, it is clear from California case law that an officer's use of deadly force must be reasonable. Therefore, the defendants are not immune from the state tort claims if plaintiff can show that Bertoli's use of force was unreasonable. This issue can not be decided on summary judgment for the reasons stated in the section 1983 analysis. Thus, plaintiff may maintain his tort claims at this time.

CONCLUSION

For the reasons set forth above, the court hereby DENIES defendants' motion for summary judgment. This is without prejudice to renewal by the County and Sheriff Ihde for *Monell*-type claims and the other claims against them.

Furthermore, this trial will be bifurcated, with the sole issue of the reasonableness of Bertoli's use of force, and damages if any, being tried first. The claims against the County and Sheriff Ihde are stayed until completion of the Bertoli trial.

IT IS SO ORDERED

Date: February 10, 2000 /s/ Marilyn Hall Patel
MARILYN HALL PATEL
Chief Judge
United States District Court
Northern District of
California

Not For Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH R. OBERFELDER, Plaintiff-Appellee, v. **CHRISTIAN A. BERTOLI,** Defendant-Appellant, and, **CITY OF PETALUMA; PETALUMA POLICE DEPARTMENT, DAVID KAHL, Sergeant; COUNTY OF SONOMA; SHERIFF'S DEPT. SONOMA COUNTY; MARK IHED, Sheriff; DAVID BERTOLI, Deputy; DENNIS DEWITT, Chief of Police,** Defendants.	No. 01-17302 D.C. No. CV-98-01470-MHP/PJH **ORDER** (Filed Aug. 8, 2003)

KENNETH R. OBERFELDER, Plaintiff-Appellee, v. **CHRISTIAN A. BERTOLI,** Defendant-Appellant, and **COUNTY OF SONOMA,** Defendant.	No. 02-15423 D.C. No. CV-98-01470-MHP

Before: **KOZINSKI, GRABER** and **BERZON**, Circuit Judges.

The motion for waiver of brief deficiency is GRANTED. The petition for rehearing and rehearing en banc is DENIED. Fed. R. App. P. 35, 40.

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER, Plaintiff, vs. CITY OF PETALUMA, et al., Defendants.	No. C-98-1470 MHP ENE **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988** Date: August 30, 2001 Time: 2:00 pm Place: Courtroom 15, 18th Floor Honorable Marilyn Hall Patel

* * *

III

ANALYSIS

A. Under The Lodestar Method, Plaintiff is Entitled To A Fully Compensatory Fee

In the Ninth Circuit, reasonable attorneys' fees are determined by the "lodestar" method. *Jordan v. Multnomah County*, 815 F.2d 1258, 1262 (9th Cir. 1987). The lodestar is determined "by multiplying the number of hours reasonably expended on litigation by a reasonable hourly rate." *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *amended by* 808 F.2d 1373 (1987).

1. Crosby Heafey's Time Spent Litigating This Action Was Reasonable

In determining the number of hours reasonably expended on the litigation, Plaintiff's attorneys are entitled to be compensated "for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest . . . " *Moore v. Jas. H. Matthews & Co.*, 682 F. 2d 830, 839 (9th Cir. 1982). "The question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief achieved. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed." *Wooldridge v. Marlene Industries Corp.*, 898 F. 2d 1169, 1177 (6th Cir. 1990).

* * *

reduced by 10.9 hours for Ms. Levy, 5.9 hours for Mr. DeJean and 1.0 hours for Ms. Pulskamp to reflect the time each spent on these issues. *Id.*

The reasonable hourly rates set forth above multiplied by the hours reasonably spent by each respective time-keeper, establishes a lodestar fee in this case of $638,109.50.

3. Defendant's Motion for New Trial

On or about June 26, 2001, Defendant filed a motion for new trial. The costs associated with obtaining copies of the reporter's transcripts will be approximately $500.00. Because Plaintiff will incur additional attorney fees opposing this motion, once the actual time opposing the motion has been determined, a supplemental motion will be filed to include the fees and costs incurred opposing the motion. *See* Levy Dec.

B. Plaintiff Is Entitled To An Upward Adjustment Of The Lodestar Amount

Once a court has set the basic lodestar amount under Section 1988, it may adjust that fee upward based on factors not subsumed within the initial determinations of the reasonable hourly rate and reasonable number of hours expended. *See, e.g., Blum*, 465 U.S. at 897; *Sorenson*, 239 F.3d at 1149, fn. 4. Although the United States Supreme Court has ruled that enhancement of the lodestar amount for contingent risk is not appropriate (*see City of Burlingame v. Dague*, 505 U.S. 557 (1992)), it left open the possibility of enhancement on other grounds. *See Guam Society of Obstetricians and Gynecologists v. ADA*, 100

F.3d 691 (9th Cir. 1996) (difficulty in obtaining local counsel justified applying 2.0 multiplier to lodestar figure).

Mr. Oberfelder's counsel is entitled to, and respectfully requests an upward adjustment of the lodestar amount based on the undesirability of the case and the difficulty of the issues presented. *See Hensley*, 461 U.S. at 430-434; *Guam*, 100 F.3d 698. In this case, Plaintiff filed this action *in propria persona* while incarcerated. He then tried to locate a lawyer to take his case on a contingency basis. *See* Levy Dec. Several lawyers turned him down. *Id.* Although the facts established a civil rights violation, few lawyers would consider taking the case because of the complex factual issues, the difficulties in proof, the likely prejudices against a convicted and incarcerated plaintiff, and the relatively low amount of special damages. *Id.* The difficulty Mr. Oberfelder encountered obtaining counsel ultimately resulted in the appointment of Crosby Heafey to represent him as part of the Federal Pro Bono Project. *Id.* Had the Court not appointed Crosby Heafey counsel, it is likely that the violation of Mr. Oberfelder [sic] civil rights would have gone unredressed. Under the *Guam* decision, this factor alone warrants an adjustment of the lodestar amount by way of 1.5 multiplier, bringing the adjusted lodestar amount to $957,164.25.

C. Plaintiff Is Entitled To Fees Associated With Preparation Of This Motion

Courts uniformly recognize that attorney's fees for the costs and attorney time spent in the preparation of a petition seeking fees pursuant to Section 1988 are compensable. *See, e.g., Anderson v. Director, Office of Workers' Compensation Programs*, 91 F.3d 1322, 1325 (9th Cir.

1996); *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1883, n. 16 (2nd Cir. 1996); *Johnson v. State of Mississippi*, 606 F.2d 635, 637-638 (5th Cir. 1979).

Plaintiff's attorney's fees and costs for this application, as of July 23, 2001, are as follows:

* * *

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER, Plaintiff, vs. CITY OF PETALUMA, et al., Defendants.	No. C-98-1470 MHP ENE **DECLARATION OF RICHARD M. PEARL IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988** Date: August 30, 2001 Time: 2:00 pm Place: Courtroom 15, 18th Floor Honorable Marilyn Hall Patel

* * *

Superior Court No. H-180743-5; *Kwong v. Lockheed Missile and Space*, N.D. Cal. No. 96-0294 WHO (Memorandum Decision and Order dated June 27, 2000); *Santos v. Santa Maria Hills Corporation*, Santa Barbara Superior

Court No. SM93355; *Ramirez v. Runyon*, N.D. Cal. No. C-97-2983 CW (Order Granting Plaintiff's Motion for Attorneys' Fees and Costs, filed August 9, 1999); and *Environmental Protection Information Center, Inc., et al. v. The Pacific Lumber Company, et al.*, N.D. Cal. C-98-3129 MHP (Order re Attorneys' Fees, filed August 20, 1999). I also was awarded my 1998 rate of $340 per hour in *Kirkland v. Morton's of Chicago*, N.D. Cal. C-96-2301 MHP (Order awarding attorney's fees, filed January 5, 1999), and in *Mora v. Chem-tronics, Inc.*, S.D. Cal. No. 97 CV 0851J(JFS) (Magistrate's Report and Recommendation, dated January 25, 1999, adopted in relevant part by Order filed July 8, 1999). It also is the rate I was awarded, plus a significant multiplier, in *Jordan, et al. v. California Department of Motor Vehicles*, Sacramento County Superior Court No. 95ASO5228 (Amended Findings of Fact and Order Regarding Attorneys' Fees and Expenses, filed July 27, 1998).

7. I have reviewed the rates claimed by the Plaintiff's attorneys in this case. In my opinion, the hourly rates being claimed are well within the range of market rates charged by Bay Area attorneys of equivalent experience, skill, and expertise for comparable work.

8. Through my writing and practice, I have become familiar with the market rates charged by attorneys in California and elsewhere. This familiarity has been obtained in several ways: (1) by handling attorneys' fee litigation; (2) by discussing fees with other attorneys; (3) by obtaining declarations regarding prevailing market rates in cases in which I represent attorneys seeking fees; and (4) by reviewing attorneys' fee applications and

awards in other cases, as well as articles on attorney's fees in the legal newspapers and treatises.

* * *

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER, Plaintiff, vs. CITY OF PETALUMA, et al., Defendants.	No. C-98-1470 MHP ENE **DECLARATION OF JO SAXE LEVY IN SUPPORT OF PLAINTIFF'S MOTION FOR AWARD OF ATTORNEY'S FEES PURSUANT TO 42 U.S.C. § 1988** Date: August 30, 2001 Time: 2:00 p.m. Place: Courtroom 15, 18th Floor Honorable Marilyn Hall Patel

* * *

25. Overall, as part of its representation of Plaintiff, Crosby, Heafey, has fought and defeated Defendant's motion for summary judgment, attended over 20 depositions (including 10 expert depositions), analyzed thousands of pages of documents and dozens of hours of tape recordings and videotape footage produced by Defendants and other government agencies, inspected the site of the shooting, conducted a recreation of events, and prepared for and completed a trial that spanned three weeks.

26. Over the last three years, Crosby Heafey attorneys have devoted more than 2,000 hours to factual investigation and discovery, expert discovery, trial preparation, and trial of this action. In an effort to prosecute this case in a cost efficient manner, Crosby attorneys enlisted the help of paralegals, summer associates, a medical analyst and a research librarian to help prepare this case for trial. In total, these individuals billed approximately 1,000 hours of time preparing this case for trial and, in the case of case assistant Sharon Pickett, providing invaluable assistance during the trial itself.

27. The rates set forth in Plaintiff's Motion for Award of Attorney's Fees reflect the rates charged by each Crosby, Heafey, Roach & May timekeeper to fee-paying clients at the time of trial or, for those associate attorneys who are no longer employed by Crosby, Heafey, Roach & May, the actual rates charged by comparable associates (i.e., associates with similar background and experience, and the same number of years in practice.)

28. I have personally reviewed the detailed billing reports reflecting the hours billed by Crosby, Heafey, Roach & May before submission to Defendant's counsel and the Court.

29. As part of my review, I deleted or discounted any billable time that, in accordance with Crosby, Heafey, Roach, & May's normal billing procedures, would not be billed to a client. For example, approximately 8.8 hours expended by one associate on the trial brief were deleted as superfluous, as were 64.9 hours expended by a summer associate on a research project, and more than 12 hours expended by case assistants preparing for trial.

30. In addition, although first year associate rates are, generally, $200.00 per hour, in this case, first year rates were charged at only $190.00 per hour. Similarly, Mr. Johnson, a senior paralegal with significant trademark and patent law experience, generally bills his time at $175.00 per hour; in this case, however Crosby Heafey billed his time at only $110.00 per hour.

31. Before submitting this motion to Defendant's counsel, I also calculated and subtracted the hours expended on the *Monell* claims against the County, and on the research and decision to dismiss the Petaluma defendants. Thus, I have already reduced my time by 10.9 hours, Mr. DeJean's time by 5.9 hours and Ms. Pulskamp's time by 1.0 hours to reflect the time each spent on these issues. The billable hours set forth in the memorandum of points and authorities at pages 11-12 reflect the actual hours reasonably necessary for the prosecution of this case.

32. I have also reviewed the out-of-pocket expenses incurred in this matter and included in this motion. The out-of-pocket expenses described in our motion for attorney fees and costs, and in our Bill of Costs and declaration in support thereof, were actually incurred, reasonably necessary for the prosecution of this case, and of the type

normally billed to Crosby's fee-paying clients. The expenses separately set forth in our Bill of Costs total $50,912.42. The out-of-

* * *

July 15, 1998
(Filed Jul. 20, 1998)

Judge Marilyn Hall Patel
U.S. District Judge
450 Golden Gate Ave.

Dear Judge Patel,

After speaking with Rebecca Tatlonghari, ADR Case Administrator, I feel it necessary to write to you in regards to the pending civil litigation in your court. Allow me to briefly explain my situation. Currently I am detained at FDC Dublin awaiting my sentencing date of August 28, 1998. I pled guilty to drug chares and have been in custody since June, 1996. During my arrest I was shot in the back by an undercover officer, and this is why I haved filed a lawsuit. I had assistance from Richard Scott, a member of my criminal defense team, to file the action against Sonoma Cty. and Petaluma police dept. Now, however, I have been unable to retain a law firm to aid me in proceeding with these matters. The suit was filed pro per to meet deadlines, but the reality is that I am unskilled in preparing the required Case Management forms, and I do not feel that I could adequately represent myself during the proceedings. The defense has hired the Law firm of Senneff & Kelly of Santa Rosa. Recently they have given me notice that they intend on deposing me at this institution. If such a deposition were to occur, I'd be at a disadvantage without representation.

I understand that the burden is on myself since I am the one who filed this action. Please understand that during this period of duress I have been mainly focusing on my criminal matters, they have had precedence. Fortunately I'll have resolve soon, and I expect to have served

the majority of my sentence, so perhaps I'll be able to give necessary attention to the civil matters.

For the past two years I have been on a medication, to help me sleep and elevate my moods. It is called elivil, a pretty strong psychotropic drug. This is due to the injuries suffered from being shot in the back. I have great difficulty in concentrating at any length due to this medication. Due to incarceration constraints, such as only pre-approved phone calls (collect), it has been difficult to contact potential attorneys. I am unfamiliar with the filing of Motions, or I suppose that I would do so at this point, perhaps you could consider this as such? Is it possible for the Court to appoint Legal counsel on my behalf? I was wrongly shot in the back by an undercover officer in broad daylight. He was definately [sic] excessive in force. I had no weopen [sic], nor have I any prior violence. I do believe that my civil rights were violated. I will continue to write letters to potential Lawyers, however I do not have the funds to send copies of the complaint and case to these attorneys. I am at a loss! I feel that I am about to be railroaded unless I can get some help. Thank you so much for your time and consideration, I hope that I did not break any rules by attempting to contact you . . .

Sincerely,

/s/ Ken Oberfelder
Ken Oberfelder 91735-011
5675 8th St., Camp Parks,
Dublin, CA 94568

Case No. C 3:98cv01470 MHP

Jo Saxe Levy (State Bar No. 136627)
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Attorneys for Plaintiff
KENNETH OBERFELDER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER, Plaintiff, vs. CITY OF PETALUMA, et al., Defendants.	No. C-98-1470 MHP ENE **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS** **Date:** August 30, 2001 **Time:** 2:00 p.m. **Ctrm:** 15, 18th Floor 450 Golden Gate Avenue San Francisco, CA

* * *

Mr. Senneff and Mr. Christiansen appeared for the Defendant. Todd Toral, who was admitted to the Bar in 1998,

took six depositions, including four of Defendant's expert witnesses.

Defendant's cry of inexperience and inefficiency are baseless accusations that are refuted by Plaintiff's attorneys' detailed time records and by the outcome of this case.

4. An appropriate number of attorneys worked on this case.

Defendant makes much of the total number of associates who worked on the case over the last three years. Yet, as Exhibit C to Mr. Shratz's Declaration indicates, generally only one or two associates worked on the case at any given time. As is common in large firms, however, associates occasionally left Crosby and other attorneys joined the litigation team. Over three years, this attrition is not surprising or unusual.

C. Defendant Cannot Overcome the Presumption that the Actual Hours Worked By Crosby Heafey Were Reasonable.

The hours Plaintiff claims are described fully in declarations and contemporaneous time records prepared by Plaintiff's attorneys. As such, they are presumptively reasonable. "Sworn testimony that, in fact, it took the time claimed is evidence of considerable weight on the issue of the time required in the usual case." *Perkins v. Mobile Housing Bd.*, 847 F.2d 735, 738 (11th Cir. 1988). Once Plaintiff's claim is fully documented, the defendant bears the burden of demonstrating *with evidence* that the hours claimed are not compensable. *Gates v. Gomez*, 60 F.3d 525, 534 (9th Cir. 1995) (emphasis added).

As set forth below, Defendant's spurious accusations of excessive time are not supported by any evidence. He relies only on a computer-generated summary that lacks foundation and improperly characterizes time entries to fit narrow and arbitrary categories.

* * *

the point in time when the work was performed." *Wooldridge v. Marlene Industries Corp.*, 898 F.2d 1169, 1177 (6th Cir. 1990).

Applying a percentage-based across-the-board reduction of Plaintiff's attorneys' fees award without a "concise but clear" explanation of how the reduction compensates for the alleged duplication or excessive hours constitutes reversible error. *See Gates v. Deukmejian*, 987 F.2d 1392, 1400 (9th Cir. 1992). In *Gates*, the Ninth Circuit reversed and remanded where the trial court simply cut Plaintiff's bills by ten percent to adjust for overbilling and overstaffing without providing a clear explanation for why the ten percent across-the-board reduction properly compensated for the alleged overbilling and duplication. In this case, Defendant has not established any overbilling or duplication of effort that justifies an across-the-board reduction in any amount, let alone the arbitrary 33% reduction Mr. Schratz proposes.

G. Defendant's Declarations Are Defective And Must Be Stricken.

Each of Defendant's declarations submitted in opposition is defective because it is not signed under penalty of perjury under the laws of the United States. *See Jack v. Transworld Airlines*, 854 F.Supp. 654, 658-59 (N.D. Cal.

1994). Accordingly, Plaintiff requests that these be stricken by the Court. *Id.*

H. The Difficulty In Finding Counsel Warrants A 1.5 Multiplier.

Defendant does not dispute that Ninth Circuit law allows multipliers to compensate for the difficulty in obtaining counsel due to the undesirability of a case. Indeed, Defendant agrees with Plaintiff's reliance on *Guam Society of Obstetricians and Gynecologists v. ADA*, 100 F.3d 691 (9th Cir. 1996). Defendant contends, however, that the facts of *Guam* are distinguishable. Plaintiff agrees that the facts of *Guam* are different than the facts of this case. Accordingly, although the *Guam* decision awarded a 2.0 multiplier, Plaintiff asked only for a 1.5 multiplier.

Defendant's only argument against a multiplier is based on supposition.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KENNETH OBERFELDER
Plaintiff,
vs.
CITY OF PETALUMA, et al.,
Defendants. /

No. C-98-1470 MHP

MEMORANDUM AND ORDER

(Filed Jan. 29, 2002)

Plaintiff Kenneth Oberfelder moves the court for attorneys' fees pursuant to 42 U.S.C. section 1988 after a successful jury trial against defendant. Having considered the parties' arguments and submissions, and for the reasons set forth below, the court enters the following memorandum and order.

BACKGROUND

Plaintiff Kenneth Oberfelder filed this action pursuant to 42 U.S.C. section 1983 against the Sonoma County Sheriff ("Sheriff"), Deputy Sheriff ("Deputy") and Sheriff's Department ("Department"). Plaintiff alleged that defendants used excessive force when Deputy Christian Bertoli shot him in the back during plaintiff's arrest. On or about July 15, 1998, plaintiff, who was incarcerated, wrote a letter to this court advising that he had been unable to retain counsel to represent him and that he was unable to properly represent himself. *See* Levy Dec., Exh. A. This court arranged through the District's pro bono counsel program for an attorney to be appointed. The program requested that the law firm of Crosby, Heafy, Roach and May represent Oberfelder in this action and that firm was

appointed pursuant to 28 U.S.C. Section 1915(e). At trial, a jury awarded

* * *

> from Department of Justice; telephone conference with Department of Justice re criminologist's reports."
>
> (c) .2 hour and $59 fees on 4/14/99: "Prepare deposition subpoenas and notices."
>
> (d) .2 hour and $59 fees 5/17/99: "Attend to scheduling deposition of Deputy Neiss."

Schratz Dec. at 10:2-18. That on occasion Levy attended to simple matters does make the billing per se unreasonable. The court recognizes that even some day-to-day work ordinarily handled by associates occasionally requires the attention of senior attorneys. The fact that the challenged billing entries are de minimis compared to the total request demonstrates that such activity is the exception rather than the norm and likely reduced that time that might have been expended by someone less experienced. The court finds the fee requests reasonable.

IV. Enhancement of Lodestar Amount

Plaintiff has requested a multiplier of 1.5 to be applied to the lodestar. The lodestar figure presumably includes a consideration of all the factors constituting a reasonable attorneys' fee and only unusual circumstances justify the enhancement of the fee by a multiplier. *See City of Burlington v. Dague*, 505 U.S. 557, 563 (1992) (fee award in a claim pursuant to environmental protection laws could not be enhanced to compensate for the risk of a contingent fee agreement). Fee-shifting statutes do not

warrant an increased fee award merely because prevailing party's counsel incurred the risk of non-payment. *Id.*

Consistent with *Dague*, the Ninth Circuit has held that an increase of a fee award is appropriate in limited circumstances, on the basis of factors not fully reflected in the basic fee. *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691 (9th Cir.1996). The *Guam* court faced an unusual set of circumstances because the remoteness of the forum limited plaintiff's opportunity to obtain local counsel. Furthermore, counsel in *Guam* faced a unique risk of ostracization and threats to personal safety upon agreeing to represent plaintiff's viewpoint relating to the controversial topic of abortion. Thus, the court approved an increase of the lodestar by a 2.0 multiplier.

Defendants claim that no multiplier should apply because the lodestar amount is presumed to be the reasonable rate and this case contains no exceptional circumstances that justify an upward adjustment to the lodestar. While noting the distinctions between *Guam* and the present case, the court believes that several distinct factors are uncompensated by plaintiff's hourly rate and that use of a multiplier is justified.

Plaintiff originally filed his civil rights lawsuit *in propria persona* in the Superior Court of Sonoma County. This court requested representation from the federal pro bono program pursuant to 28 U.S.C. section 1915(e). The program then requested the law firm of Crosby, Heafy, Roach and May to undertake representation in this case. Legal service providers voluntarily participate in this project in order to meet the needs of plaintiffs without resources to obtain representation. The participation of high quality law firms, particularly in taking on these

difficult cases, improves the accessibility of the judicial system. Although plaintiff's claims were not meritless, he could not have pressed his cause effectively without dedicated counsel.

Several factors render this case undesirable or unmanageable for potential counsel. Civil rights cases involve more risk than the contingency of recovery because their enforcement often challenges established policy and practice and upholds individual rights in the face of law enforcement activity. This was such a case. Counsel represented an unsympathetic plaintiff, who was a fugitive attempting to flee and who later pled guilty to yet other drug charges. As a result of that conviction, plaintiff was incarcerated, further straining communications between potential counsel and client. The potential for a large damage award from an empathetic jury was diminished by the fact that plaintiff incurred a relatively small amount in medical costs as a result of his injuries. The difficult factual question regarding defendant's "reasonable belief" defense required counsel to retrace events that happened very quickly, challenge the actions and judgment of a law enforcement official and defend the constitutional rights of a convicted drug dealer. In order to try this case effectively, counsel was required to independently undertake a time-consuming and expensive investigation even though there was no guarantee of reimbursement for those services. Counsel was also hindered by plaintiff's incarceration which further delay [sic] his trial. As a consequence of these factors, counsel is entitled to a fee enhancement for a three-year case that concluded with a jury verdict for their client.

The length and difficulty of the case, together with the absence of any fee-paying client, would have virtually

precluded most private attorneys from undertaking the time-consuming prosecution of this matter. To many in the legal profession, plaintiff's unfortunate circumstances overshadow his complaint of constitutional rights violations. Even with the fee-shifting provisions of section 1988, had it not been for plaintiff counsel's dedication and fortitude, more likely than not, Oberfelder would have gone unrepresented. The court grants plaintiff's request of a 1.5 multiplier.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

KENNETH OBERFELDER, PLAINTIFF, VS. CITY OF PETALUMA, ET AL., DEFENDANTS.	NO. C 98-1470 MHP PAGES 478-626 VOLUME 4

SAN FRANCISCO, CALIFORNIA
TUESDAY, MAY 1, 2001

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

CROSBY, HEAFEY, ROACH & MAY
TWO EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111

BY: JO SAXE LEVY AND JARED E. GARDNER, ATTORNEYS AT LAW

FOR DEFENDANTS:

SENNEFF FREEMAN & BLUESTONE
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P.O. BOX 3729
SANTA ROSA, CALIFORNIA 95402-3729

BY: MICHAEL D. SENNEFF AND MARSHALL E. BLUESTONE, ATTORNEYS AT LAW

REPORTED BY:
KATHERINE POPE WYATT, CSR, RPR, RMR
OFFICIAL REPORTER, USDC

COMPUTERIZED TRANSCRIPTION BY ECLIPSE

* * *

[492] MR. OBERFELDER, CORRECT?

A. THAT'S CORRECT.

Q. AND AS YOU WERE APPROACHING MR. OBERFELDER, YOU HAD A PLAIN VIEW OF HIM THROUGH THE DRIVER'S SIDE WINDOW; ISN'T THAT CORRECT?

A. THAT'S CORRECT.

Q. WHEN HE WAS BACK THREE-QUARTERS OF THE WAY, THAT WOULD BE THIS WAY?

A. WELL, YES. I HAD A PLAIN VIEW OF HIM FROM THE SIDE OF MY VEHICLE, CONTINUAL.

Q. WHEN YOU HAD THAT PLAIN VIEW OF MR. OBERFELDER THROUGH THE DRIVER'S SIDE WINDOW, THAT'S WHEN YOU SAW HIM GLANCE OVER AT YOU?

A. AS I WAS GIVING HIM COMMANDS, IDENTIFYING MYSELF, YES, HE LOOKED OVER AT ME.

Q. AND THAT'S WHEN YOU SAW HIM PUT THE CAR IN DRIVE?

A. I SAW HIM LOOK OVER AT ME, LOOK AWAY, STRAIGHT AHEAD. I SAW THE ONE HAND GO DOWN. I IMMEDIATELY THOUGHT "WEAPON," THEN THE CAR CAME –

Q. OFFICER BERTOLI, IF YOU COULD JUST ANSWER YES OR NO?

A. WELL, IT'S ONE CONTINUAL MOTION, I MEAN.

Q. OKAY. WHEN YOU SAW MR. OBERFELDER LOOK DIRECTLY AT YOU, THAT'S WHEN YOU STARTED TO RAISE YOUR GUN, ISN'T IT?

A. NO.

Q. NO?

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

KENNETH OBERFELDER, PLAINTIFF, VS. CITY OF PETALUMA, ET AL., DEFENDANTS.	NO. C 98-1470 MHP PAGES 627-759 VOLUME 5

SAN FRANCISCO, CALIFORNIA
WEDNESDAY, MAY 2, 2001

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:
CROSBY, HEAFEY, ROACH & MAY
TWO EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111

BY: JO SAXE LEVY AND JARED E. GARDNER, ATTORNEYS AT LAW

FOR DEFENDANTS:
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BY: MICHAEL D. SENNEFF AND MARSHALL E. BLUESTONE, ATTORNEYS AT LAW

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* * *

[653] CRASHING. YOU GO INTO A LOW MODE. YOUR ADRENALIN DRAINS, AND YOU ALMOST GO INTO AN EXHAUSTION PERIOD. I WASN'T EXHAUSTED, ACTUALLY, UNTIL I GOT HOME, AND I WAS EXHAUSTED.

Q. YOU HAVE TOLD THEM, TOLD THE PETALUMA POLICE DEPARTMENT THAT AT THE INSTANT THE SHOT WAS FIRED, AT THE INSTANT THE SHOT WAS FIRED YOU WERE LOOKING BEHIND THE PILLAR POST?

A. THAT'S CORRECT.

Q. AND YOU'VE TOLD US HERE IN THIS COURTROOM THAT AT THE MOMENT YOU MADE THE DECISION TO SHOOT AND STARTED TO SHOOT, YOU WERE STANDING IN FRONT OF THAT CAR LOOKING AT THE WINDSHIELD WITH THE GLARE ON IT?

A. THAT'S CORRECT.

Q. HOW DO YOU RECONCILE THOSE?

A. THAT THE REACTION TIME AND MY DECISION TO FIRE, WHAT I HAD DONE WAS I HAD FIRED PRIOR TO – THAT IT'S THAT TIME ELEMENT, THAT INSTANT OF THE DECISION AND THE ACTUAL FIRING.

I KNEW WHAT I WAS FIRING AT. I KNEW WHAT I WANTED TO FIRE AT, AND I REACTED.

Q. AND WHEN YOU TALKED TO THE PETALUMA POLICE OFFICERS YOU'RE TRYING TO RECREATE THE SCENE IN HINDSIGHT, AREN'T YOU?

A. THAT'S CORRECT.

Q. AND BY THAT POINT YOU'VE SEEN WHERE, IN FACT, THAT BULLET ENTERED THAT WINDOW?

A. YES, I HAD.

Q. AND BY THAT POINT YOU HAD –

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

KENNETH OBERFELDER, PLAINTIFF, VS. CITY OF PETALUMA, ET AL., DEFENDANTS.	NO. C 98-1470 MHP PAGES 333-477 VOLUME 3

SAN FRANCISCO, CALIFORNIA
FRIDAY, APRIL 27, 2001

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

CROSBY, HEAFEY, ROACH & MAY
TWO EMBARCADERO CENTER
SAN FRANCISCO, CALIFORNIA 94111

BY: JO SAXE LEVY AND JARED E. GARDNER, ATTORNEYS AT LAW

FOR DEFENDANTS:

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COMPUTERIZED TRANSCRIPTION BY ECLIPSE

* * *

[428] AREA.

Q. BEFORE YOU SHOT MR. OBERFELDER, YOU HAD NO REASON TO BELIEVE THAT MR. OBERFELDER WAS CAUSING IMMEDIATE DANGER TO ANYBODY OTHER THAN YOURSELF, DID YOU?

A. NOT AT THAT POINT, NO. WHEN HE CAME OUT OF THE DRIVEWAY THEN I WAS THE ONE HE WAS THREATENING. I WAS THE ONE HE WAS COMING AT.

Q. AND YOU FIRED AT MR. OBERFELDER BECAUSE YOU THOUGHT THAT HIS VEHICLE WAS COMING AT YOU AND WAS GOING TO HIT YOU; IS THAT CORRECT?

A. IN THE MATTER OF SECONDS I HAD TO DECIDE THAT, YES, THAT'S WHAT I THOUGHT.

Q. WHEN YOU FIRED THE GUN YOU WERE LOOKING AT THIS PILLAR POST, WEREN'T YOU?

A. I WAS LOOKING IN THE AREA OF THAT PILLAR POST, YES.

Q. WHEN YOU SAW MR. OBERFELDER COMING OUT OF THE DRIVEWAY YOU KNEW HE WAS TRYING TO ESCAPE, DIDN'T YOU?

A. I KNEW HE WAS TRYING TO ESCAPE, AND AT THE SAME TIME HE WAS COMING AT ME, AND THAT I THOUGHT THAT HE WAS GOING TO STRIKE ME OR RUN ME OVER.

Q. WHEN YOU SAW HIM PUT THE CAR IN DRIVE, YOU KNEW HE WAS TRYING TO GET AWAY FROM YOU, DIDN'T YOU?

A. I KNEW HE WAS TRYING TO ESCAPE FROM ME, AND IN THE PROCESS HE WAS COMING AT ME WITH THAT VEHICLE.

* * *

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

KENNETH OBERFELDER, PLAINTIFF, VS. CITY OF PETALUMA, ET AL., DEFENDANTS.	NO. C 98-1470 MHP PAGES 760-954 VOLUME 6

SAN FRANCISCO, CALIFORNIA
THURSDAY, MAY 3, 2001

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

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COMPUTERIZED TRANSCRIPTION BY ECLIPSE

* * *

[925] **A.** THAT'S CORRECT, BASED ON WHAT HE DESCRIBED IN HIS DEPO AND HIS STATEMENTS, YES.

Q. NOW, YOU'VE INDICATED THIS MORNING THAT THE – BECAUSE HE SAID IT WAS A LITTLE BIT FURTHER BACK, IT MIGHT AFFECT THAT, SO HOW MUCH FURTHER BACK ARE YOU ASSUMING NOW?

MS. LEVY: OBJECTION, YOUR HONOR. THERE'S BEEN NO EVIDENCE HE'S MAKING ANY ASSUMPTIONS.

THE COURT: OBJECTION'S OVERRULED.

YOU MAY ANSWER THE QUESTION.

THE WITNESS: I BELIEVE HIS DESCRIPTION WAS SEVERAL FEET BACK FROM THERE.

BY MR. SENNEFF:

Q. SEVERAL FEET IN YOUR MIND BEING WHAT, THEN, FOR PURPOSES OF YOUR ANALYSIS?

A. I DIDN'T COMPLETE A FORMAL ANALYSIS ON THE TRIAL TESTIMONY.

Q. SO YOU HAVEN'T GONE BEYOND THIS IN TERMS OF THE TIME INVOLVED FROM HIS STOP UNTIL THE TIME OF THE SHOT?

A. THAT'S CORRECT.

Q. ALL RIGHT. BUT AT DEPOSITION YOU HAD HIM AT THAT POSITION FOUR-AND-ONE-HALF SECONDS BEFORE ALL OF THE EVENTS TRANSPIRED AND THE SHOT HAPPENED?

A. WHEN YOU SAY "ALL OF THE EVENTS," INCLUDING THE MOTION OF THE VOLVO AND MR. BERTOLI'S MOTION FROM HIS CAR, YES.

Q. ALL RIGHT.

MR. SENNEFF: THEN, I'LL MARK THE NEXT AS EXHIBIT Z.

[926] (DEFENDANT'S EXHIBIT Z WAS MARKED FOR IDENTIFICATION.)

BY MR. SENNEFF:

Q. I'LL SHOW YOU EXHIBIT Z WHICH IS EXHIBIT 14 TO YOUR DEPOSITION. DO YOU RECOGNIZE THAT?

MS. LEVY: YOUR HONOR, COULD WE HAVE A COPY?

THE COURT: DO YOU HAVE HIS DEPOSITION?

MR. SENNEFF: I HAVE AN EXTRA.

THE COURT: YOU HAVE AN EXTRA COPY?

MR. SENNEFF: I HAVE HIS DEPOSITION. I DON'T' KNOW WHICH EXHIBIT.

THE COURT: FOURTEEN, DID YOU SAY?

MR. SENNEFF: FOURTEEN. HERE'S A COPY.

THE WITNESS: YES, I RECOGNIZE IT.

BY MR. SENNEFF:

Q. AND WHAT WAS THAT EXHIBIT INTENDED TO REPRESENT?

A. THE APPROXIMATE CIRCULAR PATH OF OFFICER BERTOLI FROM HIS VEHICLE, CIRCLING INTO THE MIDDLE OF THE STREET, AND THE LENGTH OF THAT PATH AT THE TIME THE VOLVO BEGAN ITS MOTION.

Q. ALL RIGHT. JUST PRIOR TO THE VOLVO BEGINNING ITS MOTION?

A. THAT'S CORRECT.

Q. ALL RIGHT.

MR. SENNEFF: I WOULD LIKE TO – I'LL OFFER EXHIBIT Z, YOUR HONOR.

THE COURT: EXHIBIT Z IS ADMITTED.

[927] **MS. LEVY:** NO OBJECTION.

(DEFENDANT'S EXHIBIT Z WAS RECEIVED IN EVIDENCE.)

BY MR. SENNEFF:

Q. I WOULD LIKE TO PLACE ON THE BOARD – ON THE PROJECTOR. NOW, IT'S IN A DIFFERENT PERSPECTIVE, BUT AM I CORRECT, SIR, THAT WHAT YOU'RE SAYING AT DEPOSITION IS THAT OFFICER BERTOLI WAS MOVING OUT IN THE

ROADWAY BY YOUR RECONSTRUCTION BEFORE THE VOLVO STARTED, TO A POINT WHERE APPROXIMATELY 1.8 SECONDS HAD ELAPSED?

A. THAT'S CORRECT.

Q. RIGHT. AND AT THAT POINT THE VOLVO HAD NOT YET MOVED; IS THAT CORRECT?

A. THAT'S CORRECT, BASED AGAIN ON THE RECONSTRUCTION, BASED ON HIS STATEMENTS IN DEPO.

Q. RIGHT. AND THEN, YOU NEXT POSITED WHERE OFFICER BERTOLI WAS AFTER THE VOLVO STARTED MOVING, DIDN'T YOU?

A. THAT'S CORRECT.

Q. SO AT THIS POINT IN EXHIBIT Z, BEFORE THE VOLVO MOVES, OFFICER BERTOLI IS MOVING TOWARDS THE FRONT OF THE VOLVO AND THERE ARE NOW, BY YOUR CALCULATIONS, 2.7 SECONDS LEFT BEFORE THE SHOT?

A. THAT'S CORRECT.

MR. SENNEFF: AS EXHIBIT NEXT IN ORDER, YOUR HONOR, I WOULD LIKE TO – WHICH WOULD BE DOUBLE A.

[928] **THE COURT:** YES.

MR. SENNEFF: WHICH IS EXHIBIT 15 TO MR. DEYERL'S EARLIER DEPOSITION.

(DEFENDANT'S EXHIBIT AA WAS MARKED FOR IDENTIFICATION.)

BY MR. SENNEFF:

Q. MR. DEYERL, I WILL SHOW YOU EXHIBIT AA AND ASK YOU IF YOU RECOGNIZE THIS.

A. YES, I DO.

Q. AND WHAT IS THAT?

A. THAT'S A DIAGRAM SHOWING ANOTHER SNAPSHOT OR FRAME IN TIME DURING MR. – OFFICER BERTOLI'S MOTION, BASED ON AN ANALYSIS BASED ON HIS STATEMENTS IN DEPOSITION.

Q. ALL RIGHT. AND I WILL PLACE – I'LL OFFER EXHIBIT DOUBLE A, YOUR HONOR.

MS. LEVY: NO OBJECTION.

THE COURT: DOUBLE A IS ADMITTED.

(DEFENDANT'S EXHIBIT AA WAS RECEIVED IN EVIDENCE.)

BY MR. SENNEFF:

Q. AS WE LOOK AT DOUBLE A, YOU RENDERED AN OPINION SHOWING WHERE OFFICER BERTOLI WAS WITH RESPECT TO THAT VOLVO AS IT WAS STARTING TO COME OUT OF THE DRIVEWAY, DIDN'T YOU?

A. BASED ON THIS ANALYSIS, CORRECT. THAT'S CORRECT.

Q. RIGHT. AND AT THAT TIME, YOU PLACED HIM IN A POSITION [929] WHERE HE WAS OVER TO

THE FRONT OF THE VOLVO ON ITS DRIVER'S SIDE; IS THAT CORRECT?

A. HE WAS ALIGNED WITH THE SEAM AT THE CENTER OF THE DRIVEWAY, WHICH IS THAT SMALL LINE GOING ACROSS THE SIDEWALK.

Q. AND THE VOLVO IS COMING TOWARDS HIM; IS THAT CORRECT?

A. THAT'S CORRECT.

Q. HOW LONG HAS THE VOLVO BEEN TRAVELING TOWARDS HIM BY YOUR ANALYSIS AT THAT POINT?

A. ABOUT 1.2 SECONDS.

Q. ALL RIGHT. AND AT THAT POINT IN TERMS OF YOUR ANALYSIS, WHAT IS THE SPEED OF THE VOLVO?

A. ABOUT FIVE MILES AN HOUR, BETWEEN FIVE AND SIX MILES AN HOUR.

Q. WELL, I THOUGHT YOU TESTIFIED IT WAS 5.5 TO 7 MILES PER HOUR.

A. NO. THAT'S WHEN THE FRONT BUMPER REACHES THE ROADWAY.

Q. OH. SO THE DIFFERENCE BETWEEN THE FRONT BUMPER IN THIS EXHIBIT DOUBLE A NOT REACHING THE ROADWAY AND REACHING THE ROADWAY, IT ACCELERATES THE SPEED? DOES THE SPEED PICK UP IN THAT AREA?

A. BETWEEN THIS FRAME AND WHICH FRAME?

Q. THE FRONT OF THE BUMPER REACHING THE ROADWAY.

A. AND THIS FRAME?

Q. YES.

A. THE VEHICLE CONTINUES TO ACCELERATE, THAT'S CORRECT.

[930] **Q.** AND YOUR ESTIMATE IS THAT AT THIS POINT THE VOLVO IS TRAVELING BETWEEN SIX AND A HALF –

A. I THINK IT'S BETWEEN FIVE AND SIX IS MY RECOLLECTION.

Q. BETWEEN FIVE AND SIX.

BY THE WAY, AS THAT VOLVO IS COMING OUT, IS IT ACCELERATING?

A. YES.

Q. AND AS IT IS COMING OUT, IS IT COMING ON A FLAT, LEVEL SURFACE OR IS IT COMING DOWNHILL?

A. THE DRIVEWAY IS SLIGHTLY SLOPED.

Q. AND WOULD THAT AFFECT THE ACCELERATION RATE?

A. IF YOU MEASURED IT RELATIVE TO A LEVEL SURFACE, YES.

Q. HOW WOULD IT AFFECT IT?

A. IF YOU WOULD MEASURE THE ACCELERATION OF THE CAR ON A LEVEL SURFACE AND

COMPARE IT TO THIS SURFACE THIS SURFACE WOULD INCREASE. HOWEVER, WHEN I MEASURED IT, I INCLUDED THE SLOPE WHEN I MEASURED IT.

Q. AT SIX FEET PER SECOND – EXCUSE ME. AT SIX MILES AN HOUR, HOW FAR IS THAT VOLVO TRAVELING PER SECOND?

A. SIX MILES AN HOUR IS ROUGHLY NINE FEET A SECOND.

Q. SO AT THIS POINT WHERE OFFICER BERTOLI IS OVER THERE IN FRONT OF THE DRIVER'S SIDE IN THE CRACK IN THE SIDEWALK, THAT VEHICLE IS COMING AT NINE FEET PER SECOND, NOT YET HAVING TURNED; ISN'T THAT CORRECT?

A. THAT'S CORRECT. RIGHT AT THAT POINT IS WHERE IT WOULD [931] BEGIN TO TURN.

Q. HOW FAR DOES THE VOLVO TRAVEL – WITHDRAW THAT.

BETWEEN THE POINT WHERE IT'S TRAVELING AT NINE FEET PER SECOND AND THE POINT, IN YOUR OPINION, WHERE THE SHOT IS FIRED, HOW MUCH FASTER DOES THE VOLVO GET GOING?

A. ULTIMATELY, IT GETS GOING BETWEEN 10 AND 13 MILES AN HOUR. AT THE TIME OF THE SHOT IT'S GOING ABOUT FIVE, SIX MILES AN HOUR NOW, SO IT INCREASES BETWEEN FIVE AND EIGHT MILES AN HOUR.

Q. AT 13 MILES PER HOUR, HOW FAR IS THAT VOLVO TRAVELING PER SECOND?

A. ROUGHLY 19 FEET OR SO.

Q. OKAY. AND FROM THIS POINT IN THE DRIVEWAY THAT WE SEE IN EXHIBIT DOUBLE A, TO THE POINT WHERE THE SHOT IS ACTUALLY FIRED, WHAT IS THE LINEAL DISTANCE?

A. IT'S ABOUT 19 AND A HALF – 18 AND A HALF I THINK.

Q. SO IT'S LESS THAN A SECOND?

MS. LEVY: OBJECTION, YOUR HONOR. NO FOUNDATION.

THE COURT: I HAVEN'T' EVEN HEARD THE WHOLE QUESTION YET.

MR. SENNEFF: IT'S AN IMPROPER QUESTION.

THE COURT: OKAY.

MR. SENNEFF: I STEPPED AHEAD OF MYSELF.

BY MR. SENNEFF:

Q. FROM YOUR ESTIMATE AT DEPOSITION, YOU ESTIMATED BETWEEN THIS POINT SHOWN IN DOUBLE A AND THE MOMENT OF THE SHOT WAS 1.5

* * *

Supreme Court, U.S.
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No. 03-690

In The

Supreme Court of the United States

CHRISTIAN A. BERTOLI,

Petitioner,

vs.

KENNETH OBERFELDER,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

1. Whether there was instructional error where the jury was instructed to evaluate petitioner deputy sheriff's use of deadly force to determine whether shooting a fleeing suspect in the back to prevent his escape was objectively reasonable under the peculiar facts and circumstances within the petitioner's knowledge.

2. Whether the district court abused its discretion in awarding attorneys' fees.

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INTRODUCTORY STATEMENT

The petition for writ of certiorari makes no credible argument why this Court should examine an unpublished memorandum opinion in a case involving fact-bound, case-specific jury instructions and highly discretionary lower court rulings on an attorneys' fees award. No showing of any kind has been made that the issues posed here extend beyond this case, that the opinion conflicts with any other opinion, that the opinion under review is likely to cause the slightest confusion to anyone, or that any error was committed.

No matter how artfully petitioner tries to craft the first question presented, he simply does not raise any legitimate issue of qualified immunity. It has long been settled that qualified immunity from suit is available in deadly force cases to police officers who have an objectively reasonable belief that their safety or that of others is threatened. Petitioner's argument to the contrary notwithstanding, the jury instructions given this particular jury required it to resolve that very question. Unfortunately for the petitioner, despite these instructions, the jury found that he shot respondent in the back to prevent his escape, a conclusion supported by overwhelming evidence.

The second question posed by the petition fares no better. Petitioner asks this Court to review a highly discretionary ruling of the experienced Chief Judge of the United States District Court for the Northern District of California. The district court concluded that this case presented exceptional circumstances justifying a modest enhancement based on its factual finding that respondent would not have secured counsel had the district court not appointed counsel for him. That conclusion, contained in

an unpublished district court opinion, and affirmed unanimously in an unpublished court of appeals opinion, simply does not merit this Court's attention. The two opinions will have no precedential value, will engender no confusion, and are plainly correct.

STATEMENT OF THE CASE

A full statement of the facts is necessary in this opposition because the Petition for Writ of Certiorari fails to give the Court either a complete or a fair picture of the evidence. Moreover the petition does not recognize the standard by which this Court is required to review that evidence, indulging all facts and factual inferences that reasonably support the jury's verdict. Instead, petitioner proceeds as though the jury credited *his* version of the facts rather than respondent's. In point of fact, even a superficial analysis of the verdict reveals that the jury, faced with overwhelming evidence, concluded that petitioner shot respondent in the back to prevent respondent's escape and not because petitioner had any objectively reasonable basis to believe that either he or anyone else was in any physical danger. This case does not, therefore, provide a suitable vehicle for this Court to consider any issue involving jury instructions on the subject of qualified immunity.

A. Respondent Files Suit After Petitioner Shoots Him In The Back To Prevent His Escape

This case arises out of an incident on June 27, 1996, in Petaluma, California, during which petitioner Sonoma

County Deputy Sheriff Christian Bertoli shot respondent Kenneth Oberfelder in the back.

On June 20, 1997, respondent filed a complaint *in pro per* in Sonoma County, California, Superior Court, naming petitioner and various public officials including the Sonoma County Sheriff, the City of Petaluma, the County of Sonoma and other public entities alleging that his constitutional rights were infringed when he was shot. Defendants removed the case to federal court on April 10, 1998, and the matter was assigned to Chief Judge Marilyn Hall Patel who had over twenty years of experience on the district court bench hearing cases brought under the Civil Rights Act.

B. The District Court Appoints Counsel To Represent Respondent Without Objection From Petitioner Or Any Other Defendant

In July, 1998, respondent wrote to Chief Judge Patel, explaining that he was incarcerated at the Federal Detention Facility in Dublin, California, where he was awaiting sentencing on various drug charges. Respondent reported that he had not succeeded in retaining counsel to represent him, and that he lacked funds to make meaningful contact with potential counsel.

The court concluded that respondent was in need of and had requested counsel, and found that Ms. Jo Saxe Levy (nee Kerlinsky) of Crosby, Heafey, Roach & May, had agreed to accept appointment as respondent's counsel. The court appointed Ms. Levy to represent respondent pursuant to 28 U.S.C. § 1915(e)(1) and the Northern District of California's Federal Pro Bono Project.

Petitioner did not object to this appointment. In fact, at no time in the district court did petitioner question respondent's financial status, even though an inability to afford counsel is a predicate to appointment of counsel under the federal *in forma pauperis* statute. *See* 28 U.S.C. § 1915(e)(1).

C. Trial Proceeded Against Petitioner Only And The Evidence Established That Petitioner Shot Respondent In The Back After Respondent Had Already Driven Past Petitioner

Six months before the date of the shooting, the Sonoma County Sheriff's Department began investigating respondent as a suspected drug dealer. After several months of failing to catch respondent selling drugs, the Sheriff's Department decided to use an undercover informant to set respondent up for arrest on drug charges. The plan was for six vehicles, including four unmarked, undercover trucks and one helicopter, to follow respondent and prevent his escape.

The Sheriff's Department effected its plan on June 27, 1996. On that date, respondent met in a parking lot with the undercover informant chosen by the Sheriff's Department to set up the drug deal. Petitioner and at least two other undercover agents followed respondent as he drove his 1983 Volvo sedan from the parking lot and to various locations in and around the city of Petaluma. When it became apparent that respondent was headed to a particular residence in Petaluma, Sergeant Rochester ordered petitioner and two other undercover officers to arrest respondent upon his arrival at the residence.

Petitioner, driving a pick-up truck, arrived at the residence while respondent was backing his Volvo into the driveway. However, before respondent turned off the engine or exited the car, petitioner pulled to an abrupt stop in front of the house. Without waiting for respondent to exit the Volvo, petitioner, wearing blue jeans, a baseball cap and sporting long, disheveled hair, ran from his vehicle with his gun raised and pointed at respondent's head.

Petitioner saw respondent look at him, turn his head away, reach down and shift the car into drive. Petitioner told the Petaluma Police Department on the night of the shooting that, at that point, he understood respondent was making a move to escape.[1]

The jury heard an expert reconstructionist who reviewed all the physical evidence and concluded that the Volvo exited the driveway turning right at a speed between five and seven miles per hour and was traveling between ten and thirteen miles per hour *away* from petitioner at the time petitioner fired his weapon. The bullet shattered the rear passenger window on the driver's side. Exhibit 248, admitted into evidence at trial and included in the appendix to this brief, demonstrates the

[1] Respondent's testimony, which the jury is presumed to have accepted, was that after he backed into the driveway, he saw a man with long hair and a crazed, angry look, jump out of a truck and point a gun at him. His attention focused on the gun; he did not read the words on the man's shirt or notice the star on his baseball cap. Respondent did not know who the man was, and thought it was someone who was trying to kill him. Afraid for his life, respondent put the Volvo in drive and, even before the front bumper reached the roadway, began steering the Volvo to the right – away from petitioner.

approximate relative position of petitioner with respect to the Volvo at the time of the shooting. (Resp. App. at 1a)

Respondent drove another few blocks, then pulled over and was apprehended. He was taken by helicopter to a local hospital where he was admitted and he remained for eight days.

On May 11, 2001, the jury returned its special verdict finding that petitioner had used excessive force against respondent, that the excessive force caused respondent's injuries, and that the amount of respondent's injuries was $100,000.

A motion for new trial was made on June 27, 2001, and opposed on August 10, 2001. The motion was denied on October 9, 2001. Judgment was entered on October 15, 2001.

D. The District Court Awarded Respondent His Attorneys' Fees And Costs

On July 23, 2001, respondent filed a motion for attorneys' fees. Petitioner opposed the motion, and on January 29, 2002, the district court issued a 17-page unpublished order in which it concluded that respondent was entitled to his attorneys' fees and costs. (Pet. App. at 52a-56a) The court calculated $627,062 as the lodestar for respondent's attorneys' fees. Then, drawing on its direct observation of the proceedings and its extensive experience in cases of this nature, the court determined this was an exceptional case presenting unusual circumstances justifying enhancement of the lodestar figure. (Pet. App at 53a-56a) It concluded a multiplier of 1.5 was warranted and awarded $940,593 for attorneys' fees. The court also

awarded $62,305.78 for pre-trial and trial costs, and $19,261 in fees and $7,764.04 in costs connected with the motion for fees.

E. The Court Of Appeals Affirms The Judgment And The Award Of Attorneys' Fees In An Unpublished Memorandum Opinion

On November 5, 2001, petitioner filed his notice of appeal from the judgment on the jury's verdict, and on February 27, 2002, he filed a notice of appeal from the order awarding fees. The court of appeals consolidated the two appeals for oral argument. On March 10, 2003, the consolidated case was argued before Judges Kozinski, Graber and Berzon, and on June 4, 2003, the Court issued its unpublished memorandum opinion affirming both the judgment and the fee award. Petitioner's petition for rehearing was denied on August 8, 2003.

REASONS FOR DENYING THE PETITION

A. This Case Does Not Present The Question Whether Petitioner Was Deprived Of The Opportunity To Present A Qualified Immunity Defense To The Jury

Petitioner's principal concern here and in the court of appeals seems to be that the defense of qualified immunity never went to the jury. Why this should raise a certiorari-worthy issue for this Court, even if correct, is never explained. But in any event, petitioner is plainly wrong.

The *first prong* of the qualified immunity issue – the objective reasonableness of petitioner's belief that his life

was in danger – was in fact placed before the jury and the *second prong* – whether the law was reasonably clear – was not a jury question and in any event was conceded by petitioner at the trial. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Petitioner seems to claim that the jury never resolved two questions: (1) whether a reasonable officer would have believed that the use of deadly force was appropriate; and (2) whether the officer had a reasonable but mistaken belief as to the facts establishing the existence of his need to use such force. (Pet. at 11) Tellingly, petitioner makes this claim without ever advising the Court exactly what the jury was told. The reason, no doubt, is that the instructions given the jury in this case required the jurors to resolve precisely those two issues.

The jury was told that: "Deputy Bertoli's use of deadly force was objectively reasonable only if under the facts and circumstances within Deputy Bertoli's knowledge, including his background and experience, a reasonable officer would have probable cause to believe that Mr. Oberfelder posed a significant threat of death or serious physical injury to himself or others."[2]

---

[2] The full instructions on excessive force were as follows:

Any peace officer who has reasonable cause to believe that an individual to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.

In this case, you're to assume that Deputy Bertoli had probable cause to arrest Mr. Oberfelder.

A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of

(Continued on following page)

This instruction fully embodied the two questions petitioner contends were not presented to the jury. First, the instruction required the jury to determine whether petitioner had an objectively reasonable belief that respondent posed "a significant threat of serious physical injury or death to himself or others." It did not require that petitioner *in fact* have been under a threat. So long as

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the resistance or threatened resistance of the person being arrested. Nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest, or to prevent escape, or to overcome resistance.

Any individual who is being arrested by a peace officer has a duty under the law not to resist the detention or the arrest.

It is also not disputed in this case that defendant, Deputy Bertoli, used deadly force when he fired his weapon. Deputy Bertoli's use of deadly force was objectively reasonable only if under the facts and circumstances within Deputy Bertoli's knowledge, including his background and experience, a reasonable officer would have probable cause to believe that Mr. Oberfelder posed a significant threat of death or serious physical injury to himself or others.

The determination of the reasonableness of Deputy Bertoli's belief must be judged from the perspective of a reasonable officer on the scene at the time he fired his weapon, rather than from the perspective of viewing the event after it has already occurred.

Your determination must embody allowance for the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation in circumstances that are tense, uncertain and rapidly evolving.

The constitution forbids the use of deadly force to prevent the escape of a suspect when he poses no immediate threat to the officer and no threat to others. (RT 1332:21-1334:7)

"a reasonable officer" in petitioner's position at the time would reasonably have concluded there was a threat, petitioner was free to use deadly force.

Second, the instruction directed the jury to consider the "facts and circumstances within Deputy Bertoli's knowledge." By finding in favor of respondent, the jury implicitly concluded petitioner's actions were not reasonable in light of his knowledge of the facts and circumstances, an eminently reasonable conclusion considering petitioner shot respondent in the back after respondent's car had passed him.

The instruction proposed by petitioner added nothing to the one given by the district court. That instruction would have told the jury:

> A law enforcement officer is protected by qualified immunity if a reasonable officer could have believed his conduct was justified. In this case, you must decide whether a reasonable officer would have believed that their [sic] life was in danger at the time of the incident. Conduct is considered reasonable unless it is obvious that no reasonable officer would have taken the same action under the same or similar circumstances.

This instruction did not differ materially from the one actually given by the district court.[3]

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[3] According to petitioner, his proposed instruction would have told the jury that "[t]he defense of qualified immunity is intended to protect a law enforcement official unless they [sic] are plainly incompetent or knowingly violate the law." (*See* Pet. at 5) However, petitioner's proposed instruction did not actually *require* the jury to make a finding of "plain incompetence" (whatever that may mean) or "knowing

(Continued on following page)

Had the jury found that petitioner was "reasonably mistaken about his belief that his life was in danger," it could not have found – as it must have under the trial court's instructions on excessive force – that no reasonable officer would have probable cause to believe that respondent posed a significant threat of death or serious physical injury to himself or others. It is simply untrue, as claimed by petitioner that the jury was never asked to determine whether petitioner was reasonably mistaken that his life was in danger. Not only was it asked that very question, but it found that respondent had proved by a preponderance of the evidence that the answer to the question was "no."[4]

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violation of the law." And in any event, an officer who uses deadly force in the absence of a reasonable belief that he or anyone else is in danger is, by definition, incompetent, and no separate jury finding of "incompetence" is either required or appropriate.

[4] *Snyder v. Trapagnier*, 142 F.3d 791 (5th Cir. 1998), cited by petitioner [Pet. at 13], which was decided before *Saucier v. Katz*, 533 U.S. 194 (2001), is not persuasive for many reasons. First, its assumption that qualified immunity is a jury question is questionable after *Saucier v. Katz*, and is inconsistent with other authority from the same court. *See Mangieri v. Clinton*, 29 F.3d 1012, 1015-16 (5th Cir. 1994). Second, its view that the subjective understanding of the officer is the test [*see* 142 F.3d at 801] was not the law either before *Saucier* or since. *See Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001); *Saucier*, 533 U.S. at 204-207. Finally, as the Solicitor General in *Snyder* confessed to this Court (which consequently dismissed the certiorari petition on the ground that it had been improvidently granted), that case had proceeded to the jury on excessive force instructions that permitted the jury wrongly to conclude that although the officer used excessive force, he was still entitled to qualified immunity. *See Snyder v. Trepagnier*, No. 98-507, 1999 WL 170671 at *10 (U.S. Mar. 24, 1999) (Brief for the United States as Amicus Curiae Supporting Respondent).

B. There Is No Basis For This Court To Grant Certiorari To Review The Court of Appeals' Unpublished Opinion Affirming The District Court's Unpublished Exercise Of Discretion In Awarding Attorneys' Fees

Petitioner offers no reason why this Court should use its limited resources to review the court of appeals' decision affirming the district court's discretionary award of attorneys' fees. Petitioner does not contend the court of appeals' decision conflicts with the decision of any other court in any circuit. Nor does he even suggest that the question he presents arises with any frequency. In the end, then, he is attempting to lure this Court into examining an isolated and routine discretionary ruling by an experienced District Judge who fully understood when it is appropriate and when it is not appropriate to enhance an award of attorneys' fees.

Moreover, petitioner has waived many portions of his argument. For example, his contention that the record does not establish respondent's indigence or his inability to find volunteer counsel [*see* Pet. at 21] were not timely raised in the trial court. Petitioner did not object to the appointment of counsel, and certainly never questioned respondent's indigence, even though that status is a prerequisite to appointment of counsel under 28 U.S.C. § 1915(e)(1). Only in his opposition to the motion for attorneys' fees, long after the court appointed counsel for respondent, did petitioner for the first time, question the adequacy of the evidence that respondent would not have been able to obtain counsel had the district court not appointed counsel. And even then, petitioner did not submit any *evidence* to support his contention that respondent could have found counsel had he only looked longer and harder.

Factual questions such as these are generally inappropriate candidates for this Court's review. *See NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981) (concluding Court's grant of review of cross-petition was improvident because it presented "primarily a question of fact," "which does not merit Court review"); *see also* Sup. Ct. R. 10 (review "rarely granted" when petition asserts "erroneous factual findings"). Petitioner's failure to raise these questions in the district court at a time when respondent could have responded and further developed the record makes their consideration by this Court even more inappropriate.

Petitioner also never presented to the district court or the court of appeals his current argument that the award of attorneys' fees violated his due process rights under the Fourteenth Amendment. (Pet. at 21-22) He has therefore waived this argument as well. *See United States v. United Foods, Inc.*, 533 U.S. 405, 416-417 (2001) (refusing to consider arguments not raised in court of appeal).

In addition to these procedural problems standing in the way of the Court reviewing petitioner's challenge to the enhancement, the court of appeals' decision is simply not in error. The court of appeals correctly concluded the district court did not abuse its discretion in using a 1.5 multiplier to enhance the lodestar. *See Guam Soc. of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 696 (9th Cir. 1996) ("The abuse of discretion standard applies not only to the basic fee computation but also to the multiplier.").

The district court's opinion reveals that it understood the governing principles: the lodestar sum is the rule,

multipliers are the exception, and the mere contingent risk of non-payment is not a proper basis to apply a multiplier. This particular District Judge has respected these principles not just in word, but in action as well, having not hesitated in other cases to reject a multiplier where to do so was appropriate. *See, e.g., Ortega v. O'Connor*, 1996 WL 724779, *5 (N.D. Cal. 1996). Here, however, Chief Judge Patel concluded the unique facts of this case presented exceptional circumstances justifying an enhancement.

This was not an abuse of discretion. Chief Judge Patel found on the basis of more than twenty years experience with cases of this kind, that respondent's status as a fugitive who was convicted of narcotics offenses and incarcerated in a federal prison camp in Arizona, and his inability to contact counsel, made it unlikely that his meritorious case would have ever seen the inside of a courtroom in the Northern District of California had counsel not agreed to take the case *pro bono*. *See Guam*, 100 F.3d at 697 (undesirability of case and low likelihood that other attorneys would have accepted it supported 2.0 multiplier). Counsel's superior performance also factored into Chief Judge Patel's decision. *See Wing v. Asarco, Inc.*, 114 F.3d 986, 989 (9th Cir. 1997) (the quality of counsel's representation and results obtained may also support a multiplier).

The court of appeals' unpublished memorandum opinion agreed with the district court as to each factor, and amplified on its reasoning, by explaining that when counsel is appointed rather than retained, market forces that normally ensure the reasonableness of a lodestar do not come into play. (Pet. at 6a) Even members of the panel who have not shied away from opposing enhancements in

other cases, concluded the district court did not abuse its discretion in enhancing respondent's attorneys' fees award. *Compare Guam,* 100 F.3d at 712-713 (Kozinski, J., dissenting in part). Thus, at each level, the question of the appropriateness of an enhancement was considered by jurists who have demonstrated respect for the limited application of enhancements.

Petitioner's principal legal argument why this Court should examine the court of appeals' decision consists of his contention that respondent's status as an incarcerated prisoner could not support an enhancement. (*See* Pet. at 18 ["The issue squarely presented here is whether the incarcerated status of a civil rights plaintiff is the 'exceptional circumstance' envisioned by this Court to justify a $334,000 fee enhancement on top of a $638,109 lodestar award."]) However, he cites no case holding that a plaintiff's incarceration is wholly irrelevant. Thus consideration of respondent's incarceration *as one of many factors* suggesting the undesirability of his case cannot constitute error. Moreover, even if that factor was in error, it would not require reversal. *Fadhl v. City and County of San Francisco*, 859 F.2d 649, 651 (9th Cir. 1988) (enhancement is proper so long as any of the reasons on which the district court legitimately relied would support it). For all of these reasons, the challenge petitioner attempts to bring to the award of attorneys' fees is inappropriate for this Court's review.

CONCLUSION

The Petition for Writ of Certiorari offers no plausible basis for the writ to issue and the petition should, accordingly, be denied.

DATED: December 9, 2003.

Respectfully submitted,

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Attorneys for Respondent
Kenneth Oberfelder

Where was Officer Bertoli Relative to the Vehicle and Mr. Oberfelder When He Fired?





(3)

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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REASONS FOR GRANTING THE WRIT

1. Respondent modifies the question presented by the petition to divert the Court from the impact of the Ninth Circuit's disregard for the qualified immunity standards outlined in *Saucier v. Katz*, 533 U.S. 194 (2001), *Anderson v. Creighton*, 483 U.S. 635 (1987), and *Malley v. Briggs*, 475 U.S. 335 (1986). By focusing on the excessive force instruction as given, rather than on the qualified immunity issue urged by petitioner pre-trial (by motion for summary judgment), during trial (through jury instructions) and post-trial (upon motion for new trial after *Saucier* was decided), respondent has all but ignored the fundamental issue raised by the petition: when the facts are disputed such that a jury determination on excessive force is required after a Rule 50(a) motion was denied, why should an officer be barred from having disputed facts critical to a qualified immunity determination heard as well? As this Court instructed in *Saucier*, *supra*, 533 U.S. at 208, if "a reasonable officer in petitioner's position *could have believed* that [his life was threatened]", immunity exists. Should not the jury, rather than the trial court, make factual determinations of whether any reasonable officer could have believed as petitioner did that deadly force was justified in light of the mistaken split-second perception, or, conversely, that the officer was plainly incompetent or knowingly violated the law? After *Saucier*, the answer to this question is "yes."[1]

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[1] The Tenth Circuit, in a case published after petitioner's initial brief was filed, has correctly held that disputed facts regarding a government official's reasonable belief that he was not violating constitutional rights of a plaintiff was properly a jury question, when

(Continued on following page)

Respondent's failure to acknowledge in any way the significance of the jury's question during deliberations of how to analyze the issue of "self-defense" only serves to underscore its importance. If, as respondent contends, the jury simply disbelieved petitioner, why would the question have come up at all? Can it be said definitively that the district court correctly refused to allow the jury to consider the *disputed fact* regarding petitioner's perception at the time of the shooting? Is it so clearly outside the realm of possibility that, had the jury been instructed and petitioner allowed to argue, that only "plainly incompetent" officers or those who "knowingly violate the law" may be civilly liable, the jury could have considered the significance of petitioner's *reasonable, even if entirely mistaken belief* that his life was in danger? Instead, the jury was told that if petitioner intended to pull the trigger (rather than the gun going off by mistake or accident), then the

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disputed facts prohibited a pre-trial determination of qualified immunity. While the facts are not analogous to this excessive force case, the Tenth Circuit's discussion of the jury's role contradicts the Ninth Circuit's ruling below. *See, Maestas v. Lujan*, ___ F.3d ___, 2003 WL 22810441 at *3-*7 (facts may be so intertwined with the law that a jury question is appropriate as to whether a reasonable person in defendant's position would have believed constitutional right was not violated, emphasizing the jury's role in assessing the official's reasonable belief, since the doctrine of qualified immunity shields a defendant both from trial *and from damages*). In that case, the jury was asked to determine if the defendant's belief that he had a consensual relationship with plaintiff, rather than a coercive one in violation of Title VII and 42 U.S.C. §1983, would shield him from damages even if his belief was incorrect. While the instruction given in *Maestas* does not correlate to the instruction petitioner requested as it was not an excessive force case, the reasoning of the Tenth Circuit as to why such questions should be determined by a jury parallels the issue presented by petitioner's first question presented.

"intent" element for excessive force was met, and respondent argues that petitioner's "intent to pull the trigger" fully satisfies petitioner's qualified immunity inquiry. This cannot be the result intended when this Court held that qualified immunity "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter v. Bryant,* 502 U.S. 224, 229 (1991), *quoting Malley v. Briggs*, 475 U.S. 335, 341 (1986). It protects *all*, not just some, of such officials; including petitioner. The district court clearly should have allowed the jury to determine the disputed fact as to whether either of these things were true of petitioner before denying the immunity, and should not have held, as it did in denying the motion for new trial, that the excessive force instructions satisfied the qualified immunity question.[2] The Ninth Circuit's endorsement of the district court's misapplication of the *Saucier* inquiry is a certworthy error.

Respondent also ignored the Fifth Circuit's Model Jury Instruction which incorporates the language petitioner requested in his proposed jury instruction. That instruction would have allowed the jury to find, as the jury did in *Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1988), that the elements necessary for a finding of excessive force were present, but still determine that petitioner's mistake

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[2] Respondent relies on semantics rather than fairness in suggesting that petitioner never requested that the jury be asked to decide the issue, because the proposed jury instruction stated that the immunity simply applies, rather than "actually *requir[ing]* the jury to make a finding of [plain incompetence] (whatever that may mean) or [knowing violation of] the law." (Resp. Br. 10, n.3.) Petitioner believes that the proposed instruction needs no such interpretation.

in the facts as perceived by him (his belief that his life was threatened by respondent driving his car toward petitioner) was not unreasonable, even if completely wrong. Just as with the officer in *Snyder* who shot a fleeing suspect in the back after mistakenly believing the suspect was armed (although it was clear that no weapon was ever found and, thus, the officer was mistaken about his perception), the jury found that the evidence supported a finding of an unconstitutional use of force, but also found that the officer was neither "plainly incompetent nor knowingly violated the law" and thus was immune from damages for his conduct. Petitioner is entitled to the same jury inquiry.

It is impossible to reconcile the jury's inquiry regarding self-defense with respondent's statement that the jury *was* asked (apparently implicitly) to determine whether petitioner was reasonably mistaken that his life was in danger, and "found that respondent had proved by a preponderance of the evidence that the answer to the question was 'no.'" (Resp. Br. 11) The instruction to the jury regarding the meaning of "intentional," and the absence of an award of punitive damages by the jury when it was instructed such damages were appropriate if the conduct was intentional, supports petitioner's claim that the jury should have been allowed to consider the disputed question of whether petitioner was plainly incompetent or knowingly violated the law.

2. Respondent urges that the Ninth Circuit decision should not be reviewed by this Court because the decision in which it turned this Court's earlier pronouncements on their head was unpublished. It is true that the "anonymous" nature of an unauthored, unpublished decision presents precedential problems, but the Supreme Court

Rules do not prohibit review of such decisions on this basis.[3] The law which was applied by the Ninth Circuit is wrong, and the decision will have ramifications on other decisions within and outside the circuit for the "firsts" that it pronounces: That where facts are disputed, law enforcement officers who are accused of an unreasonable use of deadly force are not entitled to qualified immunity at any stage of the litigation. As with all "unpublished" decisions, the case is reviewable in the Westlaw database, is cited in West Group's "Federal Appendix" directory[4], and its reasoning may be adopted by the Ninth Circuit in any other published decision if it believes that the reasoning supporting the Court's decision reflects a correct statement of law. If it does not reflect a correct statement of law, petitioner becomes a sacrificial lamb to the Ninth Circuit's qualified immunity jurisprudence, and this Court has jurisdiction to correct the misstatement before it is adopted by any other panel, or circuit.

3. Apparently uncomfortable with the fact that a $333,000[5] windfall fee enhancement was awarded to respondent on the sole basis that he was incarcerated at the time his suit was filed, respondent asserts that the issue was "waived" by petitioner, an assertion which deserves careful scrutiny.

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[3] The fact that a court of appeals has ordered that its opinion not be published is no bar to Supreme Court review. See, *Transamerican Freight Lines v. Brada Miller Freight Systems*, 423 U.S. 28, 34 (1975).

[4] 67 Fed.Appx. 408 (9th Cir. 2003)

[5] Respondent describes the enhancement as "modest," even though it eclipses the damages award of $100,000 three-fold.

The entire basis for the fee multiplier came from the Oberfelder letter (Pet. App. at 46a-47a) requesting appointment of counsel. The letter was not accompanied with a proof of service, and in fact was never served upon or produced to petitioner until it accompanied the post-trial motion requesting the attorney fee enhancement. The district court's order appointing counsel made no reference to a letter having been received, or for the basis of its decision to appoint counsel for petitioner. (Patel Order of 9/18/98) Petitioner could not have "timely raised [objection] in the trial court" because respondent never "timely" produced the letter forming the basis of the appointment. Respondent's rationale that "only in opposition to the motion for attorney's fees . . . did petitioner for the first time, question the adequacy of the evidence that respondent would not have been able to obtain counsel" is true, but respondent's failure to inform petitioner of the facts giving rise to the appointment (and, consequently, the enhancement) cannot be deemed to constitute a waiver by *petitioner*. It was "only" then raised, because the issue was only "then" disclosed to petitioner. Once disclosed, petitioner raised evidentiary objections to the respondent's misstatements about and reliance on the unauthenticated letter, which objections were ignored by the district court. Petitioner raised the same objections in the Ninth Circuit which were again ignored, and not mentioned in the opinion upholding the enhancement.

Respondent is incorrect in stating that this claimed "waiver" poses procedural grounds to deny the petition. Respondent is left, then, with his sole argument that the enhancement did not constitute an abuse of discretion. Urging a liberal interpretation of the actual words from the Oberfelder letter, respondent claims that the letter

establishes an "inability to contact counsel" (Resp. Br. 14) when the letter states exactly the opposite: that Oberfelder had a "team" of private attorneys who were "focusing on his criminal matters" and, once they were done, he could "perhaps" focus on the civil case. (Pet. App. at 46a-47a) It further carries on the exact error that petitioner claims the Ninth Circuit committed by its "explanation that when counsel is appointed rather than retained, market forces that normally ensure the *reasonableness of the lodestar* do not come into play," thereby justifying the *enhancement*. (Resp. Br. 14.) The enhancement was not required, however, to "ensure the reasonableness of the lodestar" which had already been acknowledged as "reasonable" by respondent and his experts, and which was predicated on the highest number of hours at the highest market rate.

Similarly, petitioner did not waive his argument that the Ninth Circuit's singular ruling that an enhancement of $333,000 was appropriate amounts to a violation of petitioner's due process rights under the Fourteenth Amendment. As the briefing in the Ninth Circuit indicated (and which respondent did not dispute), there were no decisions upholding a multiplier in a civil right's case in the Ninth Circuit since *Guam Soc. Of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691 (9th Cir. 1996). Upholding the multiplier in this instance, in the face of uncontroverted evidence that the lodestar *was* reasonable without any adjustment, irreconcilably conflicts with this Court's directive in *Blum v. Stenson*, 465 U.S. 886, 898 (1984), requiring that the fee applicant establish that "such an adjustment is *necessary* to the determination of a reasonable fee." It flies in the face of Ninth Circuit authority holding that where the "[applicant] introduced no evidence

that an enhancement was necessary to provide fair and reasonable compensation" it is inappropriate to provide an upward adjustment to the lodestar fee (*Jordan v. Multnomah County*, 815 F.2d 1258, 1264 (9th Cir. 1987). The resulting windfall endorsed by the Ninth Circuit results in a due process deprivation similar to those raised and visited by this Court in the punitive damage context, only more egregious. The constitutional implications arise from the Ninth Circuit's ruling, no other, and thus have been raised at the first instance in this petition. The interests of justice support a review of the plain error evident from the Ninth Circuit's opinion upholding a far-from-modest fee enhancement when not necessary for determination of a lodestar fee award.

The two questions raised by the petition both involve areas of 42 U.S.C. Section 1983 litigation which are badly in need of the Supreme Court's authoritative voice. Qualified immunity arises with virtually every excessive force case filed, and in most civil rights cases. There has never been direction from this Court as to the jury's role on the determination of qualified immunity when factual disputes exist, and to what extent a trial judge must allow the jury to resolve such disputes before making a qualified immunity ruling.

It is not unusual for 42 U.S.C. §1983 cases to be filed by incarcerated persons. Is it to be that the incarcerated plaintiff is entitled to greater recovery than one not guilty or convicted of a crime whose constitutional rights have been violated? The Ninth Circuit would have it so; certainly, the issue is one of national import, not only to attorneys defending such suits, but to every public employee susceptible of falling within the umbrella of "color of law."

In the area of law enforcement, where many of the 42 U.S.C. §1983 cases arise, fundamental fairness requires that *stare decisis* be deferred to when dealing with qualified immunity law and with the law governing attorney fee awards, both areas having been snubbed by the Ninth Circuit. The resulting "punitive" award of $333,000 is unduly harsh, and should be reviewed before similar such windfalls follow.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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